

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

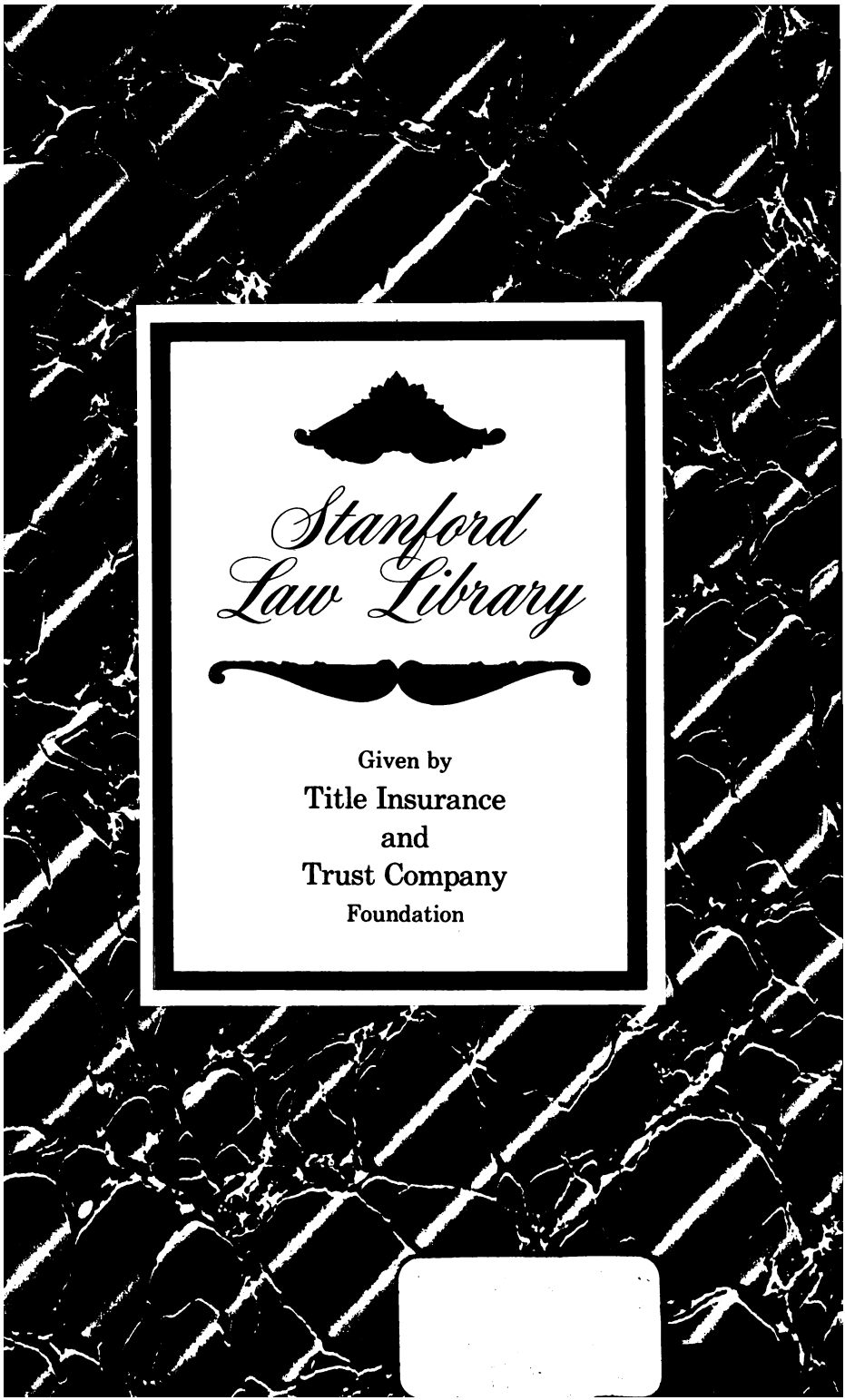
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`


Stanford
Law Library
Given by
Title Insurance
and
Trust Company
Foundation



EP
ACZ
AQn2

LAWS

CONCERNING

TITHES.

By
J. Cunningham Esq

LAWS

CONCERNING

CITIES

CUNNINGHAM

A

NEW TREATISE

ON THE

LAWS

CONCERNING

TITHES:

CONTAINING

All the Statutes, Adjudged Cases, Resolutions and Judgments relative thereto,

UNDER THE FOLLOWING HEADS:

CHAP. I. Definition of Tithes, Parsonage, Vicarage, Impropriation, and Appropriation; and of the Origin, Nature, and several Kinds of Tithes.

II. Out of what things Tithes shall be paid; what Lands are subject to Tithes, and the several Statutes for dissolving Abbies, Monasteries, and other Religious Houses, and vesting their Lands in the King; what Lands are discharged from Tithes by these Acts respectively, with a Catalogue of the Monasteries dissolved by Stat. 31 Hen. 8. of the yearly value of 200 l. and upwards; what Order they were of, and the Times of their respective Foundations.

III. Of Exemptions from Payment of Tithes; and of Modus, Custom, and Prescription.

IV. An Alphabetical Table or Index of Things Titheable, and not Titheable.

V. Of setting out, and Taking and Carrying away Tithes.

VI. Of the Remedies for recovering Tithes, and the several acts of Parliament made for that Purpose.

VII. Of Suits in the Court of Exchequer concerning Tithes, and the Proceedings in such Suits.

VIII. Of Prohibitions in Suits for Tithes.

IX. Of Leases of tithes, for lives or years, by ecclesiastical persons.

X. Of the Manner of paying Tithes, and the sums payable by the respective parishes in London.

XI. Cases concerning Tithes, determined in the Court of King's Bench, by the Earl of Hardwicke, and Lord Mansfield.

The SECOND EDITION, Corrected and enlarged, with the addition of several Cases never before printed.

By a GENTLEMAN of the MIDDLE TEMPLE.

LONDON:

Printed by His Majesty's Law-Printers;

For W. GRIFFIN, in Catherine-Street, three Doors from the Strand.

M.DCC.LXVI.

Advertiſement concerning the *Second Edition.*

IN this Edition, the ſeveral heads of the firſt, eſpecially the Seventh, concerning the payment of tithes in *London*, are much enlarged; and four Chapters, not in the former, are inſerted, together with an Alphabetical table or Index: Which improvements and additions have increaſed the Size of this to almoſt double the number of Sheets in the firſt edition.

LAWS
CONCERNING
TITHES.

CHAP. I.

Definition of Tithes, Parſonage, Vicarage, Impropriation, and Appropriation; and of the Origin, Nature and Several Kinds of Tithes.

TITHES are the tenth part of the increaſe yearly ariſing from the profits of lands, ſtocks upon lands, and the induſtry of the pariſhioners, payable for the maintenance of a pariſh prieſt, by every perſon, who hath things titheable, if he cannot ſhew a ſpecial exemption. They are an eccleſiaſtical inheritance, collateral to the ſtate of the land, not iſſuing out of it, but diſtinct from it. *Wood's Inſtit.* 161. 2 *Rep.* 44. 11 *Rep.* 13, 14.

Sir *Simon Degge* defines tithes to be, a tenth part, or ſome other thing in lieu thereof, of all the increaſe yearly ariſing out of the profits of lands and ſtock, or raiſed by the induſtry of the pariſhioner, and properly due to the clergy that have the cure of the ſouls in the pariſh where they did ariſe. *Deg. Par. Coun.* 214.

The word *parſon*, in a legal acceptation, is taken for the rector of a church parochial, and is denominated *Perſona Eccleſiæ*, becauſe he taketh upon him the parſonage, that is, the care of *perſonating*, or repreſenting the church; and therefore he is ſaid to Parſon, who;

be ſeiſed *Jure Eccleſiæ* (as a huſband is *Jure Uxoris.*) So that in his perſon, the church may ſue for and defend her rights, &c. *God.* 185.

Alſo, when a church is full, it is ſaid to be *Plena & Conſulta*, of ſuch a one *parſon* thereof, *i. e.* full and provided of a proper perſon or repreſentative, or one who may *Vicem ſeu perſonam Eccleſiæ gerere*; and ſuch a one is called *perſona imperſonata*, *Parſon imparſonee*, or parſon imperſoned, that is, a rector or parſon in poſſeſſion of a church parochial, whether the ſame be preſentative or appropriate; and the tithes and revenues of ſuch a church are commonly called *parſonage*. 1 Inſt. 300.

Parſon imparſonee.

Parſonage.

Vicar, who.

A *Vicar* is one who has a ſpiritual promotion or living under the parſon, and is ſo denominated *quaſi vice agens perſonæ*. And ſuch a promotion or living is called a *vicarage*, which is a part or portion of the *parſonage* allotted to the vicar for his maintenance and ſupport.

This part or portion is in ſome places an annual ſum of money certain; but in moſt places it is a part of the tithes in kind, which moſt commonly is the ſmall tithes; and in ſome places he has a part of the great tithes, and alſo of the glebe; and ſuch a one is called a *vicar endowed.*

Vicar endowed.

Thus he who has the right to, and poſſeſſion of, the leſs part, is called the vicar, and he that has the other, and greater part of the tithes, &c. is called the *parſon*, who in ſome pariſhes is a clergyman, and ſometimes the miniſter or incumbent of the ſame church; but in other places he is a mere layman, and cannot ſupply the church but by a ſpiritual vicar; and this ſo poſſeſſed by a layman, is called an *impropriation*, and himſelf the *impropriator*. Keb. 906.

Impropriation.

Appropriation.

But an *appropriation* is when ſuch a parſonage (or vicarage, or other church preferment) is in the hands or poſſeſſion of ſome eccleſiaſtical perſon, and his ſucceſſors, and can be made only to a body

body politick, or corporation ſpiritual, that hath ſucceſſion, whereby ſuch body becomes perpetual incumbent of the benefice appropriated, and ſhall for ever enjoy the tithes and other profits, and the cure of ſouls belonging thereto. *Cowell.* But the words *impropriation* and *appropriation* are frequently confounded in the law books.

Origin of tithes.

Biſhop *Barlow*, *Selden*, father *Paul*, and others have obſerved, that neither tithes nor eccleſiaſtical benefices, (which are correlative in their nature) were ever heard of for many ages in the chriſtian church, or pretended to be due to the chriſtian prieſthood; and, as that biſhop affirms, no mention is made of *tithes* in the grand *Codex* of canons, ending in the year 451; which, next to the bible, is the moſt authentic book in the world; and that it thereby appears, during all that time, both churches and churchmen were maintained by free gifts and oblations only. *Barlow's Remains, p.* 169. *Selden of Tithes* 82. See *Watſon's Compleat Incumbent, p.* 3, 4, *&c.*

And Mr. *Selden* has ſhewn us, that tithes were not introduced here in *England*, till towards the end of the eighth century, *i. e.* about the year 786, when pariſhes and eccleſiaſtical benefices came to be ſettled; for, as is ſaid, tithes and eccleſiaſtical benefices being *correlative*, the one could not exiſt without the other; for whenever any eccleſiaſtical perſon had any portion of tithes granted to him out of certain lands, this naturally conſtituted the benefice; the granting of the tithes of ſuch a manor or pariſh being, in fact, a grant of the benefice; as a grant of the benefice did imply a grant of the tithes: And thus the relation between patrons and incumbents was analogous to that of lord and tenant by the feudal law. *Selden of Tithes* 86, *&c.*

About the year 794 *Offa*, king of *Mertia*, (the moſt potent of all the *Saxon* kings of his time in

this iſland) made a law, whereby he gave unto the church the tithes of all his kingdom, which the hiſtorians tell us was done to expiate for the death of *Ethelbert* king of the *Eaſt Angles*; whom in the year preceding he had cauſed baſely to be murdered. But that tithes were before paid in *England* by way of offerings, according to the antient uſage and decrees of the church, appears from the canons of *Egbert*, archbiſhop of *York*, about the year 750; and from an epiſtle of *Boniface*, archbiſhop of *Mentz*, which he wrote to *Cuthbert*, archbiſhop of *Canterbury*, about the ſame time; and from the ſeventeenth canon of the general council held for the whole kingdom at *Chalchuth*, in the year 787. But this law of *Offa* was that which firſt gave the church a civil right in them in this land, by way of property and inheritance, and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil power. Yet this eſtabliſhment of *Offa* reached no further than to the kingdom of *Mercia*, over which *Offa* reigned, until *Ethelwulph*, about ſixty years after, enlarged it for the whole realm of *England*. *Prideaux on Tithes* 165, 167.

Several kinds of tithes.

Tithes, with regard to their ſeveral kinds or natures, are divided into predial, mixed and perſonal:

Predial tithes are ſuch as ariſe merely and immediately from the ground; as grain of all ſorts, hay, wood, fruits, herbs; for a piece of land or ground, being called in Latin *prædium*, (whether it be arable, meadow, or paſture) the fruit or produce thereof is called *predial*, and conſequently the tithe payable for ſuch annual produce is called a predial tithe. *Watſ.* 49. 2 *Inſt.* 649.

Mixed tithes are thoſe which ariſe not immediately from the ground, but from things immediately nouriſhed by the ground, as by means of goods depaſtured thereupon, or otherwiſe nouriſhed with the fruits thereof; as colts, calves, lambs, chickens,

chickens, milk, cheeſe, eggs. *Watſ. c.* 49. 2 *Inſt.* 649.

Perſonal tithes are ſuch profits as do ariſe by the honeſt labour and induſtry of man, employing himſelf in ſome perſonal work, artifice, or negotiation, being the tenth part of the clear gain, after charges and expences, according to a perſon's eſtate, condition, or degree, are deducted. *Watſ. c.* 49. 2 *Inſt.* 649.

No perſonal tithes ſhall be paid but of the clear gains of the party. *Mich.* 14 *Ja. B. R. per Curiam*, 1 *Rol. Abr.* 656.

As if the owner of a ſhip lends it to mariners to go to an iſland for fiſh, upon a certain quantity of fiſh to be paid to him upon their return; no tithes upon their return ſhall be paid by the mariners to the parſon out of thoſe fiſh, which the owner ſhall have for the hire of his ſhip, becauſe this is a perſonal tithe, and for that it is but of the clear gain; and ſo in *Devon*, upon the hire of a ſhip or boat to take pilchards or herrings. *Mich.* 14 *Ja. B. R. per Doderidge*, in *Goſlin* and *Horden*'s caſe, 1 *Rol. Abr.* 656.

If a man purchaſes an houſe for 300 *l.* and ſells it again in a ſhort time for 500 *l.* yet no tithe ſhall be paid of the gain thereof, for this is againſt the Common law. *M.* 11 *Ja. B. R.* between *Davies* and *Tollin* reſolved, and a prohibition granted. 1 *Rol. Abr.* 657.

By ſtat. 2 & 3 *Ed.* 6. *cap.* 13. *ſect.* 7. Every perſon exerciſing merchandizes, bargaining and ſelling, cloathing, handicraft, or any other art or faculty, being ſuch perſons and in ſuch places as within theſe forty years have uſed to pay perſonal tithes, or of right ought to pay, other than ſuch as the common day-labourers, ſhall yearly at or before *Eaſter* pay for his perſonal tithes, the tenth part of his clear gains; his charges and expences, according to his eſtate or degree, to be deducted.

Sect. 8. In all ſuch places where handicraftſmen have uſed to pay their tithes within theſe forty years, the ſame cuſtom ſhall continue.

Sect. 9. If any perſon refuſe to pay his perſonal tithes, it ſhall be lawful to the ordinary of the dioceſe where the party is dwelling, to call the party before him and examine him, by all lawful means, other than by the party's oath, concerning the payment of the perſonal tithes.

A parſon libelled in the ſpiritual court *againſt an innkeeper for tithes of the profits of his kitchen, ſtables, and wine cellar*, and alleged in his libel, that he made great gain in ſelling his beer which he bought for 500*l.* and ſold it for 1000*l.* that *negotiando* and *trafficando* he gained in the whole 3000*l.* and better; the court granted a prohibition. 2 *Bulſt.* 141. *Mich.* 11 *Jac. Dolly* v. *Davis.*

The defendant had libelled in the ſpiritual court for the tithe of a corn-mill as a predial tithe. The plaintiff ſet forth in his anſwer, that he conceived the tithe of a corn-mill to be a perſonal tithe; and therefore prayed to be allowed all his neceſſary charges in attending the mill before the tithe ſhall be paid. The judge over-ruled this plea, and decreed that the plaintiff ſhould pay theſe tithes without any ſuch deduction. Upon which Mr. *Denniſon* moved for a prohibition, and cited the caſe of *Chamberlain*, v. *Clifton*, determined in the houſe of lords the 20*th* of *June* 1706, wherein it was reſolved, that the tithe of a corn-mill was perſonal tithe; accordingly a rule was made to ſhew cauſe. 2 *Barnard. Rep. in B. R.* 336. *Mich.* 7 *Geo.* 2. *Donalt* v. *Lowther.*

It was decreed in the houſe of Peers, on appeal from the court of *Exchequer*, that the tithes of a mill *are perſonal* tithes, againſt ſeveral ſeeming authorities or doubts in the books; and that in conſequence of their being perſonal tithes, not the tenth toll or tenth diſh of the corn ground belongs

belongs to the parſon, but the *tenth part of the clear profits*, after the charges of erecting the mill, and the other charges of ſervants, horſes, and other expences deducted. *Abr. Equity Caſes* 366. *Newt* v. *Chamberlain*, S. C. cited 2 *Williams's Rep.* 463. as determined in the houſe of lords upon an appeal from a decree of the court of *Exchequer*, where the bill was brought for the tithes of a malt-mill in *Tiverton* in *Devonſhire*, and where the lords determined, with the aſſiſtance of eight judges, (whereof *Holt* Ch. J. was one) that mills were tithable, but that the ſame was a perſonal tithe, and ſo ought to be paid out of the clear gain, after all manner of charges and expences deducted. And upon the authority of this caſe, the maſter of the Rolls decreed, *Trin.* 1728. in caſe of *Carleton* v. *Brightwell*, the mill in queſtion there to pay tithes, but they ſhould be only paid as a perſonal tithe. 2 *Will. Rep.* 463.

The above caſe of *Newte* and *Chamberlain* is more fully reported in 8 *Vin. Abr.* 39, 40. thus:

Mr. *Newte* being rector of the portions of *Pitt* and *Tidcomb*, of the rectory and pariſh church of *Tiverton* in *Com' Devon*, and an horſe-mill for the grinding of malt, being erected within the ſaid portions by the corporation of the ſaid borough, who in 1699 had leaſed the ſame to the appellants for three years at 30 *l. per Annum*. *Newte* preferred his bill in the *Exchequer*, *Mich.* 3 *Ann.* and on 20th *February* 1705, the cauſe was heard and debated, and the court took time to deliver their opinions until the next term after, and on 22d *April* 1706, the court of *Exchequer* were unanimouſly of opinion, that tithes were due for this new erected mill, and that ſuch tithe was the tenth toll diſh, and decreed the appellants to account with the reſpondent accordingly, *viz.* from the 8th of *May* 1699, to the 8th of *May* 1701, and alſo to pay coſts; from which decree the de-

fendants in the *Exchequer* appealed to the houſe of lords. 1. Becauſe the tithe of a horſe-mill was a perſonal tithe, for there was no natural increaſe from it, but only a profit ariſing from the invention of a machine and the labour of a man and horſe, and if it were perſonal the ſame could only be for the tenth of the neat profit, deducting all charges. 2. If a perſonal tithe was due for ſuch mill, it was only due where perſonal tithes have been by cuſtom paid for 40 years before the ſtatute of *Ed.* 6. 3. Though appellants only took 2*d. per* buſhel for grinding, and the reſpondent did not prove any cuſtom, nor the value of the tenth toll-diſh, nor any other toll to be taken by the appellants. 4. That the tenth toll-diſh would be more ſometimes than the whole proprietors gains, conſidering the expence of erecting and maintaining this mill. 5. That the corn will pay tithe twice, for that moſt of the corn that was ſo ground was grown within the ſame pariſh, and ſo the tenth paid to the reſpondent in the field; and if any was ground that grew elſewhere, the ſame did in like manner pay the tenth to the incumbent where it grew. 6. This decree will introduce a new ſort of tithe, and will affect a great many people in *London*, where there are many ſuch mills, and ſome thouſands of them are in other parts of the kingdom; and if this decree be affirmed, they muſt all pay tithes. On the reſpondent's part it was inſiſted; 1. That tithes were due both by the canon and ſtatute law for new erected mills; that tithes were by the canons due for all mills, and by *Artic. Cler. Chap.* 5. for new erected mills, which expreſly provides, that no prohibition ſhall lie in ſuch a caſe. 2. That there had been from time to time ſeveral reſolutions and decrees for tithes of mills. 3. That the reſt of the mills within the reſpondent's portions had all along paid, and did ſtill pay tithes for the ſame, and every *Modus* for a mill

proves tithes to be due, if they were not diſcharged by ſuch *Modus*. 4. That it was a predial tithe, and the tenth toll-diſh payable for the ſame; and ſo was both the canon and cuſtom and uſage of this kingdom. 5. That this was not a double tithe, for it was paid by different perſons, and for different purpoſes, *viz.* in the firſt caſe by the owner of the corn; and in the ſecond caſe by the owner of the mill. This caſe was heard at the bar of the houſe of lords, *Monday* 20 *January* 1706-7. and upon ſome debate in the houſe, the conſideration if tithes predial, mixt, or perſonal, were due for ſuch a mill, and if any due, in what manner payable, was referred to the judges, who after ſeveral adjournments attended in the houſe on the 17th day of *February* following, and all the judges of the *King's Bench* and *Common Pleas* (except juſtice *Powell*) were of opinion unanimouſly, that the tithes due for a new erected malt mill, was a perſonal tithe only; and Ch. J. *Holt*, and Ch. J. *Trevor* held, that there was no tithe due at all for ſuch mill, becauſe a perſonal tithe was due only where it had been paid within 40 years before, according to the ſtatute of 2 & 3 *Ed.* 6. *cap.* 13. *ſect.* 7. upon which the lords reverſed the decree of the *Exchequer*, but ordered that Mr. *Newte* ſhould be paid the tenth part of the profits, &c. deducting all charges and expences, as reparations, &c. and that the appellants ſhould account with him in the court of *Exchequer* for theſe profits, &c. *Monday* 17th day of *February* 1706. it is ordered and adjudged by the lords ſpiritual and temporal in parliament aſſembled, that the decree of the court of *Exchequer* complained of in the petition of *Roger Chamberlain* and *Francis Plympton*, ſhall be and is hereby reverſed; and the plaintiff in the court below, *John Newte* (the now reſpondent) do recover his tithes of the ſaid mill in the nature of a perſonal tithe only; that is to ſay, the tenth part of the

the clear profits ariſing from corn ground in the ſaid mill, over and above all incident charges; and to that end an account is to be taken of the profits of the ſaid mill, and charges for the time paſt, within the time of the demand of the plaintiff *John Newte*'s bill in the *Exchequer*, and ſince, and the ſaid tithes do ſo continue to be paid for the future. And it is hereby ordered, that the ſaid court of *Exchequer* do cauſe the ſaid account to be taken, and what ſhall be found due thereon paid accordingly. *MS. Rep. Mich. Vac. 5 Ann. Chamberlain & al'* v. *Newte.*

Tithe for malt-mills is only perſonal; for it is not natural increaſe, being only profit ariſing from the invention of a machine, and the labour of man and horſe, and perſonal can only be for the tithes of the neat profit, deducting all charges. *MS. Tab. January* 20, 1706. *Chamberlain* v. *Plympton.*

Great and ſmall tithes.

Tithes, with regard to value, are divided into great and ſmall: great tithes; as corn, hay and wood. *Degge, part* 2. *c.* 1. Small tithes; as the predial tithes of other kinds, together with thoſe which are called mixt and perſonal. *Gibſ. Cod.* 663.

But it is ſaid that this diviſion may be altered, (1) By cuſtom, which will make wood a ſmall tithe under the general words of *Minutæ Decimæ* in the indowment of the vicar. (2) By quantity which will turn a ſmall tithe into great, if the pariſh is generally ſown with it. (3) By change of place, which makes the ſame things, as hops in gardens ſmall tithes, in fields, great tithes. But this ſeems to be contradicted in the caſe of *Wharton* and *Liſle, E. 5 W.* where the tithe of flax, though ſown in great fields, was adjudged to the vicar as a ſmall tithe, *Holt* Chief Juſtice, (who was of another opinion) being abſent. 4 *Mod.* 184. *Gibſ.* 1663.

And Dr. *Watſon* is of opinion, that the quantity of land within any pariſh ſowed with any thing, cannot

cannot make the tithe of another nature; and that what is called ſmall tithes ſeemeth to be in reſpect of the thing itſelf, and not from the ſmall quantity of land ſowed therewith, whereby the tithes thereof are but ſmall and of little value; for if that were to be the rule to determine what ſhall be ſaid to be ſmall tithes, then corn and hay in ſome places might be accounted ſmall tithes. *Watſ. c.* 39. And according to this latter opinion the law is now ſettled; namely, that the tithes are to be denominated great or ſmall tithes, according to the nature and quality thereof, and not according to the quantity.

It is ſaid by lord *Coke*, and many others, that before the council of *Lateran* in the year 1180, a man might have given his tithes to what church or monaſtery he pleaſed. But this Dr. *Prideaux* doth utterly deny for two reaſons. 1. Becauſe of the abſurdity of the thing; for all the laws which had been made for tithes, would have ſignified nothing, if no one had been certainly inveſted in a right to them; for in ſuch caſe, no one could claim them, and in caſe of non-payment no one could make proceſs in law for them; and conſequently, no one having a ſpecial right to demand them, it muſt have followed in practice, that what was thus paid to every ſpiritual perſon would in fact and reality be paid to none at all. 2. Becauſe, before the ſaid council, there were in this land many appropriations, whereby the tithes of whole pariſhes were aſſigned to convents or other ſpiritual corporations; all which would have ſignified nothing if the pariſhioners had been at liberty to pay their tithes to what ſpiritual perſon they ſhould think fit. *Prid.* 303. But be that as it will, it is certain that now tithes of common right do belong to that church within the precincts of whoſe pariſh they ariſe. One parſon, however, may preſcribe to have tithes within the pariſh of another; and this is what is

Portion of tithes.

called a portion of tithes. One reaſon of which might be, the lord of a manor's having his eſtate extending into what is now apportioned into diſtinct pariſhes; for there were tithes before the preſent diſtribution of pariſhes took place. But whatever original theſe portions might have, they are in law ſo diſtinct from the rectory, that if one who hath them, do purchaſe the rectory, the portion is not extinct, but remaineth grantable. But as to the cognizance thereof, the caſe being between parſon and parſon, and concerning a ſpiritual matter, that belongs, like the cognizance of other tithes, to the eccleſiaſtical court. *Gibſ. Cod.* 663.

Portion of tithes are diſtinct from tithes annexed to a rectory.

Bill by the rector of *Bonchurch* in the *Iſle of Wight*, in the county of *Southampton*, for the great and ſmall tithes of a farm, called *Luecomb Farm*, in the defendant's poſſeſſion. The defendant inſiſts that *Lovecomb* alias *Luecomb Farm*, formerly belonged to the abbey of *Guarrer*, and the abbot of *Quarrer* was ſeiſed in fee of the manor and farm of, *&c.* and all the tithes renewing thereon, *as of a portion of tithes in groſs*; that this abby, by ſurrender, and by the ſtat. 27 *H.* 8. came to the crown; and after King *Henry*'s demiſe, the ſame deſcended to King *Edward* the ſixth, who in the ſeventh year of his reign, by his letters patent granted *Manerium de Lovecomb ac grangiam, &c. ac omnes & omnimodas decimas, &c. in dicto manerio de Lovecomb, &c. parcel' reventionum dictæ Abbatiæ de Quarrer dudum exiſten'*, to *Cotton* and others, and ſo derives the title down to *Knight*, to whom the defendant was leſſee for twenty-one years. And in his anſwer he ſet forth the clauſe in the ſtat. 27 *Henry* 8. that all perſons, *&c.* who ſhould have, by any letters patents, any lands, *&c.* tithes, *&c.* belonging to any monaſtery, *&c.* diſſolved by that ſtatute, ſhould hold the ſame, in like form, manner, and condition, as the abbots, *&c.* held the ſame,

ſame, and might have held the ſame, if the ſaid abbies had not been ſuppreſſed. This cauſe was heard *February* 11, 1724. and the defendant carried his proof down from the year 1289. in a regular method, to the hands of the defendant's leſſor, *the Knights*. But *Nota*; all the written evidence produced mentioned the tithe only, "*Omnes vel omnimodas decimas, &c.*" but in none of the inſtruments was mention made of a portion of tithes, upon which the plaintiff founded his objection, that no title appeared in the defendant; *portio decimarum* being a thing diſtinct from tithes in the general acceptation. But the proof being ſo clear, *per totam curiam*, the plaintiff's bill was diſmiſſed, and the party had a decree on his croſs bill to enjoy his tithes purſuant to his grants, *&c. Bunb.* 189.

Tithes extraparochial, or within the compaſs of no certain pariſh, belong to the crown. By the canon law they were to be diſpoſed of at the diſcretion of the biſhop; but by the law of *England*, all extraparochial tithes, as in ſeveral foreſts, do belong to the king, and may be granted to whom he will. And accordingly they have been actually adjudged to him, not only by ſeveral reſolutions of law; but alſo in parliament, in the caſe of the prior and biſhop of *Carliſle* in the eighteenth of *Edward* the Firſt, concerning tithes in *Inglewood* foreſt, to wit, that the king in his foreſt aforeſaid may build towns, aſſart lands, (or make them fit for tillage,) and confer thoſe churches, with the tithes thereof, at his pleaſure, upon whomſoever he pleaſeth; becauſe that the ſame foreſt is not within the limits of any pariſh. 1 *Roll. Abr.* 657. 2 *Inſt.* 647. Tithes in extraparochial places.

By ſtat. 2 *Ed.* 6. *cap.* 13. *ſ.* 3. Every perſon which ſhall have any beaſts or cattle tithable, depaſturing on any waſte or common ground, whereof the pariſh is not certainly known, ſhall pay their tithes

tithes for the increaſe of the ſaid cattle to the parſon, owner, or their farmers, of the pariſh or place where the owner of the ſaid cattle inhabiteth.

Sect. 4. No perſon ſhall be ſued or compelled to pay tithes for any lands, which by the laws of this realm, or by any privilege or preſumption, are not chargeable with ſuch tithes, or that be diſcharged by any compoſition real.

Libel by a vicar for tithes of young cattle, and ſurmiſed, that the defendant was ſeiſed of lands in *Middleſex*, of which pariſh he was vicar, and that the defendant had *common in a great waſte called Sedgmore Common*, as belongeth to the lands in *Middleſex*, and put his cattle into the ſaid common; the defendant ſuggeſted for a prohibition, that the land where his cattle went was not within the pariſh in *Middleſex*; but no prohibition was granted, becauſe of the clauſe in the ſtatute 2 *Ed.* 6. *cap.* 13. that tithes of the cattle feeding in a waſte or common where the pariſh is not certainly known, ſhall be paid to the parſon of the pariſh where the owner of the cattle lives. *Mod.* 216. *pl.* 3. *Trin.* 28 *Car.* 2. *C. B. Anon.*

Bill brought by the rector of *S.* for tithes *of beaſts fed upon a common*; defendant, by anſwer, inſiſts, that *the common extends into ſeveral pariſhes*, and that the cuſtom was that every farmer ſhould pay tithes to the rector where he lived, and that he lived in another pariſh, and he paid the tithes to that rector; but there being proof that *the cattle was driven upon that part of the common that lies in S.* there was a decree for the rector of *S.* but reverſed becauſe the cuſtom was good, there being no incloſures. 9 *Vin. Abr.* 43.

CHAP.

CHAP. II.

Out of what things tithes ſhall be paid; what lands are ſubject to tithes; and what lands are diſcharged from tithes, with a catalogue of the monaſteries diſſolved by ſtat. 31 Hen. 8. *of the yearly value of* 200 l. *and upwards; what order they were of, and the times of their reſpective foundations.*

OF common right tithes are to be paid for ſuch things only as do yield a yearly increaſe by the act of God. 11 *Co.* 16. 1 *Rol. Abr.* 636. Things that renew yearly.

Yet this rule admits of ſome exceptions; as for inſtance, Tithe is due of ſaffron though gathered but once in three years; and concerning *Sylva Cædua*, or wood of twenty years growth, there is an entry in the Regiſter, that conſultations ſhall be granted thereof, notwithſtanding that it is not renewed every year. *Gibſ.* 669.

Generally of things increaſing yearly, tithes ſhall be paid only once in the year. *Gibſ.* 669.

But this rule alſo is not univerſally true; and it is evidently againſt the rule of the canon law; which requireth that if ſeeds be ſown upon the ſame ground, and renew oftner than once in the year, the tithes thereof ſhall be paid ſo often as they do renew. *Gibſ.* 633. And even the books of the Common law hold, that *de Jure* tithes are due of the aftermath, if not exempted by preſcription. 1 *Rol. Abr.* 640. Though lord *Coke* ſays, it was adjudged 8 *Jac.* 1. in *Baxter*'s caſe, that tithes ſhall not be paid both of the hay, and the after-paſture. See *Chap.* 4.

By the Common law of *England*, there is no tithe due for things that are *feræ naturæ*, and therefore it hath been reſolved, that no tithe ſhall be paid for fiſh taken out of the ſea, or out of a river, unleſs Things *feræ naturæ*.

unleſs by cuſtom, as in *Wales*, *Ireland*, *Yarmouth*, and other places; neither, for the ſame reaſon, is any tithe due of deer, conies or the like; but if the tithe thereof be due by cuſtom, it muſt be paid. *Gibſ. Cod.* 669. *Degge*, *p.* 2. *c.* 8. 2 *Inſt.* 651.

Quarries, &c. Of common right, no tithes are to be paid of quarries of ſtone or ſlate, for that they are parcel of the freehold, and the parſon hath tithes of the graſs or corn which grew upon the ſurface of the land in which the quarry is; ſo alſo, not for coal, turf, flag, tin, lead, brick, tile, earthen pots, lime, marle, chalk, and ſuch like; becauſe they are not the increaſe, but of the ſubſtance of the earth; and the like hath been reſolved of houſes, (conſidered ſeparately from the ſoil) as having no annual increaſe; but by particular cuſtom tithes of any of theſe may be payable. 2 *Inſt.* 651. *Gibſ. Cod.* 669. *Mo.* 908. *Cro. Eliz.* 277.

Foreſt land. As lands which are in no pariſh pay tithes to the king; ſo lands lying within the precincts of a foreſt (though alſo in a pariſh) if they be in the hands of the king, do pay no tithes; and this privilege extends to the king's leſſee, but not to his feoffee; but if the foreſt be diſafforeſted, and be within any pariſh, then they ought to pay tithes in the hands of the king's leſſee. *Bob.* 163, 177. *Gibſ. Cod.* 680.

Park. It hath been queſtioned, where a park hath paid a *Modus*, and is diſparked, whether the *Modus* ſhall continue, or be diſcharged, and tithes paid in kind; and all the books are clear, that if the *Modus* was a certain conſideration in money for all the tithes of ſuch a park, ſuch *Modus* ſhall hold, notwithſtanding it be diſparked; but if the *Modus* was, for the deer and herbage of ſuch a park, the *Modus* is gone, upon diſparking. *Gibſ.* 684. *Watſ. c.* 47.

In like manner, if the *Modus* hath been, to pay a buck and a doe for the tithes of ſuch a park, and the park is diſparked, the *Modus* ſhall continue, and the owner may give a buck and a doe out of another park; but if it was, to pay the ſhoulder of every deer, or expreſly a buck or a doe out of the ſame park, the *Modus* is gone. *Gibſ.* 684. *Watſ. c.* 47.

But where the *Modus* was, part in money, and part in veniſon out of the park, (namely, two ſhillings, and the ſhoulder of every deer,) the court was divided, two being of opinion, that the two ſhillings continued, and that the ſpiritual court ſhould aſſign an equitable recompence for the ſhoulders, according to the number that had been uſually paid; and the other two, that the money and veniſon making one intire *Modus*, the one being gone, the whole was diſſolved. *Gibſ.* 684. *Watſ. c.* 47.

Ancient demeſne.

It was held, that the king is not, by virtue of his prerogative, diſcharged of tithes for ancient demeſnes of the crown, but that as *perſona mixta* he is capable of a diſcharge *de non decimando* by preſcription, as well as a biſhop. But if the king alien any of the lands for which he is ſo diſcharged of tithes, his patentee ſhall pay tithes; and not only ſo, but the preſcription is deſtroyed for ever, although the ſame lands ſhould afterwards come into the king's hands again, by eſcheat or otherwiſe. *Hardr.* 315. *Mich.* 14 *Car.* 2.

Barren land.

By the ſtatute of 2 & 3 *Ed.* 6. *c.* 13. *ſect.* 5. All ſuch barren heath or waſte ground, other than ſuch as be diſcharged from the payment of tithes by act of parliament, which before this time have lain barren, and paid no tithes by reaſon of the ſame barrenneſs, and now be or hereafter ſhall be improved and converted into arable ground or meadow, ſhall, after the end and term of ſeven years next after ſuch improvement fully ended and

determined, pay tithe for the corn and hay growing upon the ſame.

Sect. 6. Provided, that if any ſuch barren waſte, or heath ground, hath before this time been charged with the payment of any tithes, and the ſame be hereafter improved or converted into arable ground or meadow; the owner thereof ſhall, during the ſeven years next after the ſaid improvement, pay ſuch kind of tithe as was paid for the ſame before the ſaid improvement.

Sect. 5. *After ſeven years*] Here are no *expreſs* words of diſcharge of the tithes during the ſeven years, but by the reaſonable conſtruction it *impliedly* amounts to a diſcharge during the ſeven years, and the ſeven years are to be accounted next after the improvement. 2 *Inſt.* 656.

Barren.] Although it doth yield ſome fruit, and do pay tithes for wool and lamb, or the like, yet if it be barren land, as to agriculture or tillage, which this clauſe meant to advance, it is within this act. 2 *Inſt.* 656.

But yet if the ground be not apt for tillage, yet if it be not of its own nature barren, it is not within this act; as if a wood be ſtubbed and grubbed, and made fit for the plough, and imployed thereunto; yet it ſhall pay tithes preſently; for woody ground is fertile and not barren. 2 *Inſt.* 656. *Bunb.* 159.

In the caſe of *Stockwell* and *Terry*, *July* 14, 1748. it was held by lord *Hardwicke*, that ſuch land only is within this clauſe, as, above the neceſſary expence of incloſing and clearing, requires alſo expence in manuring before it can be made proper for agriculture; and he decreed tithe to be paid on its being proved, that the land bore better corn than the arable land in the pariſh, without any extraordinary expence of manure. 2 *B. Ecc. L.* 377.

Only

Only ſuch land is intended *barren* land, which before the ploughing produced no profit to the owner. *Prem. Reports* 335. *pl.* 416. *Mich.* 1698. *in Scacc. Anon'. Bendl.* 8. *pl.* 122. 2 *Eliz.* S. P. ſays, that it is ſo underſtood by the opinion and judgment of the Common law.—S. C. cited *D.* 170. *b. Marg. pl.* 5.

By *waſte-ground*, is underſtood ſuch ground as no man claims for his own, or no man can tell to whom it certainly appertains, and lies unincloſed and unbounded with hedge or ditch; but ground that lies incloſed, and hedged and ditched in, ſo that the land is known, is not waſte ground. *Bendl.* 80. *pl.* 122. 2 *Eliz. Anon.*—S. C. cited *D.* 170. *b. Marg. pl.* 5.

By *heath ground* is intended, ſuch ground as is diſperſed and lies in common. *Bendl.* 80. *pl.* 122. 2 *Eliz. Anon.*—S. C. cited *D.* 170. *b. Marg. pl.* 5.

A ſuit was in the eccleſiaſtical court *for tithes of wheat and rye on ſixty acres of land.* The defendant moved for a prohibition, ſuggeſting, that the lands were barren heath and waſte grounds. *It was found by verdict that it was barren, but that of thirty acres of it tithe of wool and lambs had been paid.* And becauſe by another proviſo in the ſtatute, *viz.* that ſuch tithes as were paid before, ſhould be paid within ſeven years after the improvement, *&c.* and not any tithes of another nature, and becauſe the libel was not for other tithes than for wheat and rye, *the party could not have a conſultation, but* they told him that *he might commence a new ſuit in the eccleſiaſtical court for tithes of wool and lamb in the thirty acres not improved.* D. 170. b. pl. 5. 171. a. pl. 6. Mich. 1 & 2 Eliz. Pells v. Sanderſon.

If land be full of *thorns and buſhes*, from time whereof, *&c.* and it is grubbed up and made meadow or arable land, tithes ſhall be preſently

paid thereof, notwithſtanding the 2 & 3 *Ed.* 6. 13. for thoſe lands were not *naturally barren*, but became ſo by negligence or ill huſbandry, and the ſtatute intends only barren land made good by induſtry. *Cro. E.* 475. *pl.* 3. *Trin.* 38 *Eliz. B. R.* in caſe of *Sharington* v. *Fleetwood.*

Fenny land drained is not exempted by the act. *Mo.* 430. *pl.* 603.

Land which has *broom* is not within the ſtatute of 2 *Ed.* 6. for it is not barren land, and therefore if converted into arable ſhall pay tithe; *per Coke* Ch. Juſt. *Roll. Rep.* 39. *Trin.* 12 *Jac. B. R.*

If a man, at a great expence, *gains land from the ſea, which was marſh and ſandy land, and covered with ſalt water, and* afterwards *converts it into arable* land, he ſhall pay tithes preſently, becauſe this land is not barren of its own nature, but only by accident, by reaſon of the ſand and ſalt-water overflowing it; agreed *per Cur.* clearly. 3 *Bulſt.* 156. *Paſch.* 14 *Jac. Witt* v. *Buck.*

If ſheep were kept on barren land, or if it yielded any profit which yieldeth tithes, this *tithe* ought to be paid within the ſeven years; *per Richardſon* Ch. J. *Lit. Rep.* 311. *Mich.* 5 *Car. C. B. Flower* v. *Vaughan.*

In an action on the ſtatute 2 *Ed.* 6. the caſe was, An incloſure was part of the waſte, and it was turned into a paſture, and held, that though it was of ſmall value, *viz.* 2*s. per Ann.* and never ſown or turned into meadow, yet it ſhall pay tithes, and the very *incloſure is an improvement*, and it is no waſte ground within the ſtatute to be freed from *tithes* for a time, *&c. Clayt.* 127. *pl.* 226. *March* 1647. *Anon'.*

Barren lands to be exempted from tithes within the meaning of 2 *Ed.* 6. muſt be ſuch land as is *Barren ſuapte natura*; and on ſuggeſtion for a prohibition to a ſuit for tithes of ſuch land, it muſt

be *alledged* to be barren *ſuapte naturâ*; *per Powell* J. 2 *Lord Raym.* 991. *Trin.* 2 *Ann. Anon'.*

Prohibition for ſuing for tithes *of barren lands newly cultivated* was denied; firſt, becauſe the *plaintiff did not ſuggeſt that they were ſuapte naturâ ſteriles*; ſecondly, becauſe there *was no affidavit that this was pleaded in the ſpiritual court.* 6 Mod. 86. Mich. 2 Ann. B. R. Anon'.

In the caſe of *Lambert* and *Cumming*, *Mich.* 1723. on a bill for tithes in the pariſh of *Warton* in the county of *Lancaſter*, it was decreed, that an exemption of an eſtate from tithes ſhall extend to a common appurtenant to ſuch eſtate. *Bunb.* 138.

But in the caſe of a *Modus*, or cuſtomary payment in lieu of tithes, it ſeemeth, that where commons are divided, incloſed, and improved, the *Modus* can only extend to ſuch tithes as the common yielded before its improvement and diviſion into ſeveralties; as of the agiſtment of cattle, wool and lamb, or ſuch like; and not to the tithes of corn, hay or other tithes accruing *de novo*, after the improvement. But where there is a *Modus* in lieu of all the tithes of ſuch an eſtate, it ſeemeth that ſuch *Modus* ſhall cover the common appurtenant to ſuch eſtate when divided into ſeveralties and incloſed: as in the caſe of *Stockwell* and *Terry*, *July* 14. 1748. it was held by lord *Hardwicke*, where a *Modus* of 13 *l.* was paid for *Grange* farm, to which there was common appurtenant, a parcel of which common was allotted to the ſaid farm under an act of parliament for incloſing the ſaid common, that the *Modus* extended to ſuch new incloſed land. 2 *B. Ecc. L.* 388.

In a prohibition between *Sharington* and *Fleetwood*, *H.* 38 *Eliz.* for tithes in *Orwell* in the county of *Lancaſter*, it was reſolved, That if marſh, meadow or other land, for not cleanſing of the trenches or ſewers, or by ſudden accident, or inundation of waters, be ſurrounded; or by ill husbandry or unprofitable Marſh.

ſitable negligence, any land become over run with buſhes, furze, whins, and briars; yet are not they or any of them ſaid to be barren land within this ſtatute, becauſe of their own nature they are fruitful; and the parſon ſhall not by this act be barred of his tithe, by the ill huſbandry or negligence of the owner or poſſeſſor. 2 *Inſt.* 656.

Note, that though in the ſtat. 2 & 3 *Ed.* 6. *c.* 13. *ſect.* 6. there are no expreſs words of diſcharge of the tithes during the ſeven years; yet by reaſonable conſtruction it doth impliedly amount to a diſcharge during the ſeven years: and the ſeven years are to be accounted next after the improvement. 2 *Inſt.* 656.

The trial, whether lands are barren or not within the ſtatute, muſt be in the temporal, and not in the ſpiritual court; and therefore in a ſuit for tithes in the ſpiritual court, if the defendant plead that it is barren land, and that plea be refuſed, or iſſue taken upon it, there a prohibition ſhall be granted; but a prohibition ſhall not be granted upon a ſuggeſtion only that it is barren land, before it be pleaded in the ſpiritual court. *Degge p.* 2. *c.* 19. 1 *Keb.* 253.

Glebe land. Glebe is a portion of land, meadow or paſture, belonging to, or parcel of, the parſonage or vicarage, over and above the tithes. *Godol. Rep.* 409.

As long as the vicar occupies the glebe land in his own hands, he ſhall pay no tithes. But if he leaſes it to another, the leſſee ſhall pay tithes to the parſon that is impropriate. *Brown.* 69.

Glebe lands, if in the hands of the parſon, ſhall not pay tithe to the vicar, though indowed generally of the tithes of all lands within the pariſh; nor, being in the hands of the vicar, ſhall they pay tithe to the parſon: and this is according to the known maxim of the canon law, that the church ſhall not pay tithes to the church. But if

the vicar be ſpecially indowed of the ſmall tithes of the glebe lands of the parſonage; then he ſhall have them, though they are in the hands of the appropriator. *Gibſ.* 661. *Deg. p.* 2. *c.* 2.

If a parſon leaſe his glebe lands, and do not alſo grant the tithes thereof, the tenant ſhall pay the tithes thereof to the parſon. *Deg. p.* 2. *c.* 2. 1 *Roll. Abr.* 655.

And if a parſon lets his rectory, reſerving the glebe lands, he ſhall pay the tithes thereof to his leſſee. *Gibſ.* 661.

If a parſon ſow his glebe, and dieth before the ſeverance, and afterwards his ſucceſſor is inducted, and his executor or vendee ſevereth the corn; the ſucceſſor ſhall have the tithe thereof; for although the executor repreſent the perſon of the teſtator, yet he cannot repreſent him as parſon, inaſmuch as another is inducted. 1 *Roll. Abr.* 655.

Otherwiſe, if the parſon dieth after ſeverance from the ground, and before the corn is carried off; in this caſe, the ſucceſſor ſhall have no tithe; becauſe, though it was not ſet out, yet a right to it was veſted in the deceaſed parſon by the ſeverance from the ground. The ſame is true in caſe of deprivation, or reſignation, after glebe ſown: the ſucceſſor ſhall have the tithe, if the corn was not ſevered at the time of his coming in; otherwiſe, if ſevered. *Gibſ.* 662.

Abbey land.

All abbots and priors, and other chief monks originally paid tithes as well as other men, until Pope *Paſchal* the ſecond exempted generally all the religious from paying tithes of lands in their own hands; and this continued as a general diſcharge, till the time of King *Henry* the ſecond, when Pope *Hadrian* the fourth reſtrained this exemption to the then religious orders only of *Ciſtercians*, *Templars*, and *Hoſpitalers*; unto which Pope *Innocent* the third added a fourth, to wit, the *Præmonſtratenſes*, and this made up the four orders, which are common-

ly called the *Privileged Orders*; for that they claimed a privilege to be diſcharged of tithes by the pope's eſtabliſhment. See *Gibſ. Cod.* 671.

Then came the general council of *Lateran*, in the year 1215. and further reſtrained the ſaid exemption from tithes of lands in their own occupation, to thoſe lands which they were in poſſeſſion of before that council. But the *Ciſtercians*, in proceſs of time, did procure bulls to exempt alſo their lands which were letten to farm; for the reſtraining of which practice, the ſtatute of the 2 *H.* 4. *c.* 4. was made, by which it was enacted, That as well they of the ſaid order, as all other religious and ſeculars, which ſhould put the ſaid bulls in execution, or from thenceforth ſhould purchaſe other ſuch bulls, or by colour thereof ſhould take advantage in any manner, ſhould incur a *Præmunire*. So that this ſtatute reſtrained them from purchaſing any ſuch exemptions for the future; and as to the reſt, left their privileges as they were before the ſaid ſtatute, that is to ſay, under a limitation to ſuch lands only as they had before the *Lateran* council aforeſaid; and it is certain they obtained many lands after that council, which therefore were in no wiſe exempted: and alſo the ſaid ſtatute left them, as it found them, ſubject to the payment of divers compoſitions for tithes of their demeſne lands, made with particular rectors; who conteſting their privileges, even under that head, brought them to compound. Theſe two reſtraints were alſo followed by a third, at the time of the diſſolution; when as many of them as did not fall under the ſtatute of the 31 *H.* 8. *c.* 13. loſt their exemptions, there being no ſaving clauſe in the acts of their diſſolution, or ſurrender, to preſerve or to revive them.

But as to thoſe which were diſſolved by the ſtat. 31 *H.* 8. *c.* 13. *ſect.* 21. it is enacted as followeth; viz. "Where divers abbots, priors, and other eccleſiaſtical

cleſiaſtical governors of the monaſteries, abbathies, priories, nunneries, colleges, hoſpitals, houſes of friars, and other religious and eccleſiaſtical houſes and places diſſolved by this act, have had divers parſonages appropriated, tithes, penſions and portions, and alſo were acquitted and diſcharged of the payment of tithes for their monaſteries or other religious and eccleſiaſtical houſes and places as aforeſaid, manors, meſſuages, lands, tenements and hereditaments; it is enacted, That as well the king our ſovereign lord, his heirs and ſucceſſors, as all other perſons, their heirs and aſſigns, who ſhall have any of the ſaid monaſteries, abbathies, priories, nunneries, colleges, hoſpitals, houſes of friars, or other eccleſiaſtical houſes or places, ſites, circuits, precincts of the ſame or any of them, or any manors, meſſuages, parſonages appropriate, tithes, penſions, portions or other hereditaments, which belonged to any ſuch religious houſe, ſhall hold and enjoy, as well the ſaid parſonages appropriate, tithes, penſions, and portions of the ſaid monaſteries, abbathies, priories, nunneries, colleges, hoſpitals, houſes of friars, and other religious and eccleſiaſtical houſes and places, ſites, circuits, precincts, manors, meſſuages, lands, tenements, and other hereditaments, according to their eſtates and titles, diſcharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the ſaid late abbots, priors, and other eccleſiaſtical governors held and injoyed the ſame." See *Gibſ. Cod.* 671, 672, 673.

By reaſon of which diſcharge from tithes of lands, which were given to the king by this act, and which were diſcharged in the hands of the religious, it hath been more ſtrictly inquired what were the houſes diſſolved by this act than by any other of the acts of diſſolution; and therefore the names of ſuch houſes, *&c.* are here inſerted in the following catalogue:

Catalogue

Catalogue of monaſteries of the yearly value of 200*l.* or upwards, diſſolved by the ſtatute of the 31 *H.* 8. and by that means capable of being diſcharged of tithes: in which are the following abbreviations:

Ab. abbey; Pr. priory; C. Auſt. Canons of St. Auſtin; Bl. M. Black Monks; Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonſtratenſes: Carth. Carthuſians; Mon. Monks; Clun. Cluniacks; Ciſt. Ciſtercians; T. in the time of; ab. about the year.

BERKSHIRE.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
READING.	Ben. —	T. Hen. 1.	1938	14	3
Buſleſham ab.	C. Auſt.	13 Ed. 3.	285	0	0
Abington ab.	Ben —	720 —	1876	10	9

BEDFORDSHIRE.

Newnham pr.	C. Auſt.	T. Hen. I.	293	15	11
Elmiſton ab.	Ben. —	T. W. Conq.	285	12	10
Wardon ab.	Ciſt. —	1139. —	389	16	6
Chickſand pr.	Wh. C. Gilb.	T. W. Rufus	212	3	5
Dunſtable ab.	C. Auſt.	T. Hen. 1.	344	13	3
Wooburn ab.	Ciſt. —	T. John.	391	18	2

BUCKINGHAMSHIRE.

Aſhrugg coll.	C. Auſt.	T. Edw. 1.	416	16	4
Notely ab.	C. Auſt.	1112 —	437	6	8
Miſſenden ab.	Ben. —	1293 —	261	14	6

CAMBRIDGESHIRE.

Thorney ab.	Ben. —	972 —	411	12	11
Barewel pr.	C. Auſt.	1092 —	256	11	10

CHESHIRE.

St. Werburge ab.	Ben. —	1095 —	1093	5	11
Conbermeer ab.	Ciſt. —	1134 —	225	9	7

CORN-

CORNWALL.

Monateries.	Order.	Founded.	Value. £.	s.	d.
Bodmin pr.	C. Auſt.	936. —	270	0	11
Launceſton ab.	C. Auſt.	T. W. Conq.	354	0	11
St. Germain's ab.	C. Auſt.	T, Ethelſtan.	243	8	0

CUMBERLAND.

Carliſle pr.	C. Auſt.	T. W. Rufus.	418	3	4
Holme Coltrom ab.	Ciſt. —	1135. —	427	19	3

DERBYSHIRE.

Darley ab.	C. Auſt.	T. H. 2.	258	14	5

DEVONSHIRE.

Ford ab.	Ciſt. —	1133. —	374	10	6
Newnham ab.	Ciſt. —	ab. 1246.	227	7	8
Dinkeſwel ab.	Ciſt. —	1201. —	294	18	6
Hertland ab.	C. Auſt.	T. H. 2.	306	3	2
Torre ab.	Præm.	T. Ric. 1.	396	0	11
Buckfaſt ab.	Ciſt. —	T. H. 2.	466	11	2
Plimpton ab.	Ciſt. —	T. Edw. 1.	241	17	9
Taviſtock ab.	Ben. —	961. —	902	5	7
Exon pr.	Clun. —	T. Hen. 1.	502	12	9

DORSETSHIRE.

Abbotſbury.	Ben. —	ab. 1016.	390	19	2
Middleton ab.	Ben. —	T. Ethelſtan.	538	13	11
Tarrent ab.	Ciſt. —	By Hen. 3.	214	7	9
Shafton ab.	Ben. —	941. —	1166	8	9
Cerne ab.	Ben. —	T. Edgar.	515	17	10
Sherburn ab.	Ben. —	ab. 370. —	682	14	7

DURHAM.

S. Cuthbert ab.	Ben. —	ab. 842.	1366	10	9
Tinmouth pr.	Ben. —	—— ——	397	11	5

ESSEX.

Berking ab.	Ben. —	680. —	862	12	5
StratfordLangthorn ab.	Ciſt. —	1135. —	511	16	3
Waltham ab.	C. Auſt.	ab. 1060.	900	4	3

Walden

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Walden ab.	Ben. —	1136. —	372	18	1
St. Oſwith ab.	C. Auſt.	1120. —	677	1	2
Colcheſter ab.	C. Auſt.	T. Hen. 1.	523	17	0
GLOUCESTERSHIRE.					
Briſtol ab.	C. Auſt.	T. Hen. 1.	670	13	11
Hayles ab.	Ciſt. —	1246. —	357	7	8
Winchcomb ab.	Ben. —	787. —	759	11	9
Tewkeſbury ab.	Ben. —	715. —	1598	1	5
Cirenceſter ab.	C. Auſt.	T. Hen. 1.	1051	7	1
King's-wood ab.	Ciſt. —	1139. —	244	11	2
Gloucester ab.	Ben. —	680. —	1946	5	9
Lanthony pr.	C. Auſt.	1136. —	641	19	11
HAMPSHIRE.					
St. Swithins Winton ab.	Ben. —	634. ——	1509	17	2
Hyde ab.	Ben. —	by Alfred.	865	18	0
Wherwell ab.	Ben. —	by Edgar.	339	8	7
Romſey mon.	Ben. —	907. ——	393	10	10
Twinham pr.	C. Auſt.	before 1042.	312	7	0
Bellolocо ab.	Ciſt. --	1024. ——	326	13	2
Southwick pr.	C. Auſt.	T. H. 1.	257	4	4
Titchfield ab.	Præm.	T. H. 3.	249	16	1
HERTFORDSHIRE.					
St. Albans ab.	Ben. —	755. ——	2102	7	1
HUNTINGDONSHIRE.					
St. Neots ab.	Ben. --	ab. T. Hen. 1.	241	11	4
Ramſey ab.	Ben. --	969. ——	1716	12	4
KENT.					
St. Auſtins Cant.	Ben. —	605. ——	1413	4	11
Ledis pr.	C. Auſt.	1119. ——	362	7	7
Feverſham ab.	Clun.	1147. ——	286	12	6
Boxley ab.	Ciſt. —	1144. ——	204	4	11
Roffen ab.	Ben. —	600. ——	486	11	5
Mallin ab.	Ben. —	by Edmund.	218	4	2
Dartford ab.	C. Auſt.	1372. ——	380	0	0

LANCASHIRE.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Whalley ab.	Cist. —	1172. ——	321	9	1

LEICESTERSHIRE.

Leicester ab.	C. Aust.	1143. ——	951	14	5
Croxden ab.	Præm.	ab. R. 1.	385	0	10
Launda ab.	C. Aust.	T. W. Rufus.	399	3	3

LINCOLNSHIRE.

Lincoln St. Cath. pr.	Gilb. —	T. Hen. 2.	202	5	0
Kirksteed ab.	Cist. —	1139. ——	286	2	7
Revesly ab.	Cist. —	1142. ——	287	2	4
Thorton ab.	C. Aust.	1139. ——	594	17	10
Barney ab.	Ben. —	712. ——	366	6	1
Croyland ab.	Ben. —	716. ——	1803	15	10
Spalding ab.	Ben. —	1052. ——	761	8	11
Sempringham ab.	Gilb. —	1148. ——	317	4	1
Epworth mon.	Carth. —	1386. ——	237	15	2

LONDON AND MIDDLESEX.

St. John Jerusalem pr.	——	1000.	2385	12	8
St. Barth. Smithfield.	C. Aust.	1102. ——	653	15	0
St. Mary Bishopsgate pr.	——	1187. ——	478	6	6
Clerkenwell pr.	Ben. —	T. Stephen.	262	19	0
London minors.	Ben. —	T. Edw. 1.	318	8	5
Westminster ab.	Ben. —	T. Edgar.	3471	0	2
Sion ab.	C. Aust.	by Hen. 5.	1731	8	4
London a house of	Carth. —	T. Ed. 3.	642	0	4
St. Clare without Aldgate mon.	——	1292. ——	418	8	5
St. Mary charterhouse.	Carth.	1379. ——	736	2	7
St. John Holiwell.	Bl. M.	1318. ——	347	1	3
St. Mary East-Smithfield, ab.	Cist. —	1360. ——	602	11	10

NORFOLK.

Thetford ab.	Clun.	1103. ——	312	14	4
Wymundham ab.	Ben. —	1139. ——	211	16	6
Hulmo ab.	Ben. —	by Canute.	583	17	0
Westderham ab.	Præm. —	T. Hen. 2.	228	0	0

Walsingham

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Walsingham ab.	C. Aust.	ab T. Stephen.	391	11	6
Castle acre ab.	Clun. —	1090. ——	306	11	4
West acre ab.	Clun. —	T. W. Rufus.	260	13	7
NORTHAMPTONSHIRE.					
Burg. St. Peter ab.	Ben. —	by Roscre k. of Mercia.	1721	14	0
Pipewell ab.	Cist. —	1143. ——	286	11	8
St. Andrews pr.	Clun. —	1067. ——	263	7	1
Sulby ab.	Præm. —	T. Stephen.	258	8	5
NOTTINGHAMSHIRE.					
Lenton pr.	Clun. —	T. Hen. 1.	329	5	10
Thurgarton pr.	C. Aust.	T. Hen. 1.	259	9	4
Welbeck ab.	C. Aust.	T. Stephen.	249	6	3
Warsop pr.	C. Aust.	—— ——	239	10	5
Bella Valla pr.	Carth.	ab. 16 Ed. 3.	227	8	0
Newstead pr.	C. Aust.	T. Edw. 3.	219	18	8

The two last are under value in Dugdale, but thus by Speed.

NORTHUMBERLAND.					
Tinmouth, a cell to St. Albans, a nunnery.			511	4	1
OXFORDSHIRE.					
Godstow ab.	Ben. —	T. Stephen.	274	5	10
Eynesham ab.	Ben. —	by Ethelred.	441	12	2
Osney ab.	C. Aust.	T. Hen. 1.	654	10	2
Thame ab.	Cist. —	T. Hen. 1.	256	13	11
Oxford pr.	——	before Conq.	224	4	8
Dorchester ab.	C. Aust.	635. ——	219	12	0
SHROPSHIRE.					
Haghmond ab.	C. Aust.	1100. ——	259	13	7
Lilleshul ab.	C. Aust.	by Elfleda k. of Mercia.	229	3	1
Wigmore ab.	C. Aust.	1172. ——	267	2	10
Wenlock pr.	Clun.	1181. or before	401	0	7
Salop ab.	C. Aust.	1081. ——	615	4	3
Hales Owen ab.	Præm. —	T. John.	337	15	6

Monasteries.	Order.	Founded.	Value. £	s.	d.
SOMERSETSHIRE.					
Glaſſenbury ab.	Ben. —	about 300.	3311	7	4
Brewton ab.	C. Auſt.	ab. T. Conq.	439	6	8
Henton pr.	Carth. —	T. Hen. 3.	248	19	2
Witham pr.	Carth.	by Hen. 2.	215	15	0
Taunton pr.	C. Auſt.	T. Hen. 1.	286	8	10
Bath pr.	Ben. —	T. Hen. 3.	617	2	3
Keyneſham ab.	C. Auſt.	T. Hen. 1.	419	14	3
Michelney ab.	Ben. —	740. ——	447	4	11
Backland pr.	Ciſt. —	T. Edw. 1.	223	7	4
STAFFORDSHIRE.					
Dela Cres ab.	Ciſt. —	1153. ——	227	5	0
Burton upon Trent.	Ben. —	T. Eadred.	267	14	3
Croxden ab.	Ciſt. —	—— ——	—	—	—
SUFFOLCK.					
St. Edmunſbury ab.	Ben. —	1020. ——	1659	13	11
Butley ab.	C. Auſt.	1171. ——	318	17	2
Sibeton ab.	Ciſt. —	1150. ——	250	15	7
Ixworth pr.	C. Auſt.	T. W. Conq.	280	9	5
SURREY.					
Merton pr.	C. Auſt.	1414. ——	957	19	5
Shene pr.	Carth. —	1414. ——	777	12	0
Chertſey ab.	Ben. —	666. ——	659	15	8
Newark pr.	——	—— ——	258	11	11
St. Maryovers ab.	C. Auſt.	1106. ——	625	6	6
Bermundſey ab.	C. Auſt.	1106. ——	474	14	4
SUSSEX.					
Lewes ab.	Clun. —	T. W. Ruf.	920	4	6
Roberts bridge ab.	Ciſt. —	T. Hen. 2.	248	10	6
Bataille ab.	Bl. M.	1066. ——	987	0	11
WARWICKSHIRE.					
Combe ab.	Ciſt. —	T. Steph.	311	15	1
Kenelworth ab.	C. Auſt.	T. Hen. 1.	538	19	0
Meryval ab.	Ciſt. —	1148. ——	254	1	8
Nuneaton mon.	Ben. —	T. Hen. 2.	253	14	5
WILTSHIRE.					
Malmſbury ab.	Ben. —	ab. 670.	803	17	7
Bradenſtock pr.	C. Auſt.	T. W. Conq.	212	19	3
Edington pr.	C. Auſt.	1352. ——	442	19	7
Ambreſbury ab.	Ben. —	1177. ——	494	15	2

Wilton

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Wilton ab.	Ben. —	T. Ethelwolf.	601	1	1
Fairly, a cell to Lewis.	Clun. —	1125. ——	217	0	4
Laycock ab.	C. Auſt.	1232. ——	203	12	3
WORCESTERSHIRE.					
Malverne ab.	Ben. —	1083. ——	308	1	3
Eveſham ab.	Ben. —	T. Offa.	1183	12	9
Perſhore ab.	Ciſt. —	—— ——	643	4	5
Hales Owen ab.	Præm. —	T. John.	282	13	4
Bordeſly ab.	Ciſt. —	1138. ——	388	1	1
YORKSHIRE.					
St. Mary York ab.	Ben. —	1088. ——	1550	7	0
Selby ab.	Ben. —	T. W. Conq.	720	12	10
Kirkſtal ab.	Ciſt. —	1147. ——	329	2	11
De Rupe ab.	Ciſt. —	1147. ——	224	2	5
Monks Burton ab.	Clun. —	ab. 1186.	239	3	6
Noſtel ab.	C. Auſt.	T. Hen. 1.	492	18	2
Pomfrait ab.	Clun. —	T. W. Conq.	237	14	8
Giſbourn ab.	C. Auſt.	T. Steph.	628	3	4
Whitby ab.	Ben. —	T. W. Conq.	437	2	9
Montegratia ab.	Carth.	ab. 1396.	323	2	10
Newburge pr.	C. Auſt.	1145. ——	367	8	3
Belland ab.	Ciſt. —	1134. ——	238	9	4
Kirkham ab.	C. Auſt.	T. Hen. 1.	269	5	9
Melſa ab.	Ciſt. —	1136. ——	299	6	4
Brilington.	C. Auſt.	T. Hen. 1.	547	6	11
Walton ab.	Gilb. —	T. Stephen.	360	16	10
Bolton in Craven pr.	C. Auſt.	T. Hen. 1.	212	3	4
Rival ab.	Ciſt. —	1132. ——	278	10	2
Jerval ab.	Ciſt. —	T. Stephen.	234	18	5
Furnes ab.	Ciſt. —	1127. ——	805	16	5
De Fontibus.	Ciſt. —	1132. ——	998	6	8
Warter, pr.	C. Auſt.	T. Hen. 1.	221	3	10
Richal.	—— —	—— ——	351	14	6
Old Maulton ab.	—— —	T. Stephen.	257	7	0
St. Michael near Hull.	Carth.	1377. ——	231	17	3
IN WALES.					
Valle de Sancta Cruce in Denbeighſhire.	Ciſt. —	T. Edw. 1.	214	3	5
Strata Florida, in Cardiganſhire.	Ciſt. or Clun.	T. W. Conq.	1226	6	0

CHAP. III.

Of exemptions from payment of tithes; and of Modus, cuſtom, and preſcription.

THERE are five ways or means whereby abbey-lands are holden diſcharged of tithes, that is to ſay, *compoſition, bull or canon, order, preſcription of diſcharge*, and *unity of poſſeſſion of parſonage and land, time out of mind.* Of theſe five, the four firſt diſcharges the abbots themſelves had, or might have them, but the fifth was no diſcharge in the hands of the abbeys, but it made a diſcharge of payment of tithes to the king, and thoſe that claim under him, by the favourable conſtruction of clauſe 21, of 31 *H.* 8. (See *p.* 24.) for ſo much as that clauſe extends to; which opinion was long controverted, being confeſſed of all hands, that it was no full and perfect diſcharge in law. Means of being exempted from payment of tithes.

Now of the other four, the firſt three, that is, compoſition, bull or canon, and order, were granted and affixed unto the body of the monaſtery, and were granted unto them as *perſonal privileges*, in reſpect of their ſpiritual abilities or functions, and their capacity of tithes, and diſcharge of tithes for that cauſe; and therefore theſe had all vaniſhed and expired with the diſſolution of the body, if they had not been preſerved to the king and his patentees by that clauſe. But diſcharges of tithes of the lands of monaſteries by preſcription, is of another nature; for having been always (as preſcription preſumes) in ſpiritual hands, the law judges that it was never charged with tithe; as the pleading is, that the lands were *immunes a ſolutione decimarum negative, non privative*, ſcilicet, *uncharged, not diſcharged*, as if they had been once

chargeable; the reaſon whereof was, that being ſpiritual perſons they were able to miniſter to themſelves ſpiritual rites, and therefore performing *officium*, they might retain *beneficium*; and this non-charge ſtanding upon preſcription, was inherent to the land, not as a thing given, but as a *non ens*, lands that never yielded tithe; and land of the little monaſteries ſo free of tithes, the king by the ſtatute 27 *H.* 8. and his patentees, were to hold free, not by reaſon of any privilege which did need to be preſerved by any ſtatute, but ever by the grant of the land by any kind of conveyance. And therefore, though I have ſaid that diſcharge of bull, or compoſition, was to die with the corporation, yet if it were once run out time out of mind, it was then to be pleaded and uſed as a *non-charge* by preſcription, which was a title of diſcharge by the temporal law; and if it were impugned, it were to be drawn, by prohibition, to a trial at the Common law, and this without the help of any ſtatute. And therefore in the biſhop of *Wincheſter*'s caſe it was reſolved, that the biſhop holding lands of his biſhoprick diſcharged of tithes by preſcription, his farmer being a layman, ſhall have a prohibition for his diſcharge; and ſo ſhall the biſhop have himſelf, though he be a ſpiritual perſon. And yet biſhopricks and their lands are, in point of diſcharge of tithes at the Common law, out of all ſtatutes; ſo then the concluſion is, that of the five ways of diſcharge of tithes, three, that is to ſay, *order*, *compoſition*, *bull or canon*, are preſerved and kept alive by the clauſe of diſcharge in the ſtatute of 31 *H.* 8. and a fourth, which is *unity*, is created by that branch; and the fifth, which is *preſcription*, ſtands by the Common law, and has no need nor uſe of any ſtatute; *per Hobart* Ch. J. *Hob.* 309. *Hill.* 15 *Jac.* in caſe of *Wright* v. *Gerrard* and *Hilderſham*.

But

But though by ſuch unity of poſſeſſion, the perſons ſo poſſeſſed were diſcharged from the payment of tithes, yet the lands were not abſolutely diſcharged of the tithes; for upon any diſunion that might happen, the payment of tithes again revived; ſo that the union only ſuſpended the payment, but was no abſolute diſcharge of the tithes themſelves. And therefore ſuch union is not to be pleaded as a diſcharge from tithes, but only as a diſcharge from the payment of tithes. See *Hob.* 44, 297.

And ſuch union muſt appear to have had theſe four qualities: firſt, it muſt have been *juſt*, that is, claimed by right, and good and lawful title; and not by diſſeiſin, or other tortious, unjuſt, or unlawful act: for ſuch an union would not have been a good diſcharge within the ſtatute. Secondly, it muſt have been *equal*; that is, there muſt have been a fee-ſimple, both in the lands and in the tithes, as well of the lands upon which the tithes are, as of the parſonage or rectory: for if thoſe religious perſons had held but by leaſe, that had not been ſuch a unity as the ſtatute intended. Thirdly, it muſt have been *free*, that is, free from the payment of any tithes, in any manner: for if the abbots, or their farmers, or their tenants at will, or for years, had paid any manner of tithes before the diſſolution, it may be alleged as a ſufficient bar to avoid the unity pleaded in diſcharge of tithes. Fourthly, it muſt have been *perpetual*, time out of mind, that ſuch religious houſes were indowed, and ſuch religious perſons muſt have had in their hands both the rectory and the lands united, perpetually, and without interruption, before the memory of man, or (as it ſeems according to the rule of the Common law) before the firſt year of King *Richard* the firſt, diſcharged of tithes; for if by any records, or antient deeds, or other legal evidence, it can be made to appear that either the

lands or the rectory came to the abbey, ſince the ſaid firſt year of King *Richard* the firſt, ſuch union cannot be ſaid to be perpetual. See *Heb.* 298, 306, 311. *Moor* 46, 47, 528. *Dyer* 349. *Cro. Jac.* 608. 2 *Inſt.* 655.

And moreover the lands of ſuch houſes diſſolved as aforeſaid, ſhall be free from the payment of tithes, only ſo far as they were free in the hands of the churchmen, namely, whilſt they are in the hands and manurance of the owners thereof; and therefore it is neceſſary for the party who would have the advantage of this privilege, expreſly to ſhew and aver that the lands are in his hands and manurance; for to ſay that he is ſeiſed of the lands is not ſufficient, for he may be ſeiſed thereof, and yet another manure them. *Comyns Rep.* 498. *Wood, b.* 2. *c.* 2.

It hath been held alſo, that a tenant in tail, who hath an eſtate of Inheritance, ſhall be diſcharged in virtue of the clauſe aforeſaid, ſo long as he occupies the ſame himſelf; but that unity of poſſeſſion doth not diſcharge a copyholder (though a prior in that caſe was ſeiſed in fee of the manor of which it was a parcel, as was alſo impropriator); much leſs a tenant for life or years. *Gibſ.* 673.

But it is otherwiſe with regard to the king; whoſe farmers ſhall be diſcharged of ſuch tithes, as the ſpiritual perſons were, becauſe the King cannot cultivate the lands himſelf. And ſo long as the King hath the freehold, his farmers ſhall have ſuch privilege; but if after having leaſed them, he ſhall ſell the ſame, or ſhall grant over the reverſion, then the farmers ſhall pay tithes. And it hath been ſaid that this privilege extends no further than to the King's tenants at will, not to tenants for life or years. *Gibſ.* 673.

Difference between cuſtom and preſcription.

The difference between cuſtom and preſcription is this: *cuſtom* is that which gives right to a province, county, hundred, city, or town, and is common

common to all within the reſpective limits; in pleading of which, it is alleged, that in ſuch a county, or the like, there is, and time out of memory hath been, ſuch a cuſtom uſed and approved therein. *Gibſ.* 674.

Preſcription is that which gives a right to ſome particular houſe, farm, or other thing; in pleading of which it is alleged, that all they whoſe eſtate he hath in ſuch land, have time out of mind paid ſo much yearly, or the like, in full ſatisfaction of all tithes ariſing on thoſe lands. *Gibſ.* 674.

De non decimando.

Cuſtom and preſcription are either, *de non decimando*, or *de modo decimandi*. *De non decimando* is to be free from the payment of tithes, without any recompence for the ſame. Concerning which, the general rule is, that no layman can preſcribe *in non decimando*, that is, to be diſcharged abſolutely of the payment of tithes, and to pay nothing in lieu thereof; unleſs he begin his preſcription in a religious or eccleſiaſtical perſon, and derive a title to it by act of parliament. But all ſpiritual and religious perſons, as biſhops, deans, prebends, parſons, vicars (as heretofore abbots and priors), may preſcribe generally *in non decimando*, for they are more favoured than lay perſons; for this is ſtill in a ſpiritual perſon, and ſo nothing is taken from the church; for ſuch ſpiritual perſon was capable of a grant of tithes at the Common law, in pernancy. And hence it is that the parſon, or vicar of one pariſh, that hath part of his glebe lying in another pariſh, may preſcribe *in non decimando* for it; that is, (as hath been ſaid) to be free from the payment of any manner of tithe for the ſame. 1 *Rol. Abr.* 653. *Gibſ. Cod.* 674.

But this general rule, that none but ſpiritual perſons or corporations may preſcribe *in non decimando*, is to be underſtood with ſeveral exceptions; as, firſt, that the King, as being *mixta perſona*, may preſcribe *de non decimando*; by the ſame rea-

ſon, that, as ſuch, he is capable of tithes. *Gibſ.* 674. *Jones (W.)* 387. *Mo.* 483.

Secondly, that the leſſee, tenant at will, and copyholder of a ſpiritual perſon, though a layman, ſhall, in this reſpect, injoy the exemption of the leſſor, who is ſuppoſed to reap the benefit of it, in reſerving ſo much the greater rents, by reaſon of ſuch exemption. 1 *Rol. Abr.* 653. *Dig. p.* 2. *c.* 16. 2 *Rep.* 78. 1 *Leon.* 248. 1 *Cro.* 785.

Thirdly, that a county, or part of a county, may well plead a cuſtom *de non decimando*, in reſpect of this or that particular tithe; as hath been pleaded and allowed, in the caſe of tithe milk of ewes, and of tithe of underwood in the *Wild of Kent*, and in forty pariſhes in the *Wild of Suſſex*. But a ſingle pariſh may not preſcribe *de non decimando*, for particular tithes; nor may any larger diſtrict plead a cuſtom, abſolutely to have their lands freed from the payment of *all* tithes, without any thing in lieu. And leſt this allowance of a cuſtom, *de non decimando*, to laymen, in any caſe, ſhould ſeem to break in upon the general rule, the diſtinction which hath been laid down is this; that in things tithable by cuſtom only, and not *de jure*, a county or hundred may preſcribe in *non decimando* generally, for in that caſe they are diſcharged, without a cuſtom to the contrary; ſo that it is but to inſiſt on the old right, againſt which the cuſtom hath not prevailed; but for things which are tithable *de jure*, a county or hundred cannot preſcribe *in non decimando*, no more than a particular perſon; for it would be abſurd to ſay, that a hundred ſhall preſcribe *in non decimando*, where the particular perſons of which it conſiſts, cannot ſo preſcribe. 2 *Salk.* 655. *L. Raym.* 187. *Gibſ.* 674. 1 *Rol. Abr.* 653, 654.

Non decimando.

It was long a queſtion undetermined, whether a lay impropriator, as well as a clergyman, be intitled to recover the tithes, without proving payment;

ment; or, whether a *non decimando* may be pleaded againſt a lay impropriator: but in the caſe of *Benſon* and *Olive*, *T.* 1730. in the *Exchequer*, *Pengelly*, chief baron, delivered it as his opinion, that a lay impropriator, is under no neceſſity of proving payment of tithes unto him. *Bunb.* 274.

So in the caſe of lady *Charlton* againſt ſir *Blundel Charlton*, in the ſame court, lord chief baron *Reynolds* declared it as his opinion, that there can be no preſcription *in non decimando*, againſt a lay rector, any more than againſt a ſpiritual rector; and that they are equally intitled to tithes of common right; and that it is ſufficient for a lay rector to ſet forth in a bill, that he is ſeiſed of the impropriate rectory; and if he maketh out his title to that, it will be ſufficient, without putting him to the proof of having received tithes. And to this opinion, baron *Comyns* ſeemed to aſſent; but he made a diſtinction between one who ſets up a title to the rectory, and one who intitles himſelf only to the tithes, or any ſpecies of tithes, within a pariſh; for in this laſt caſe, the plaintiff ſhall be held to ſtrict proof, not only of his title, but alſo of the perception of all the tithes he ſets up a title to: and, in this preſent caſe, the plaintiff having ſet forth a title in ſir *Francis Charlton* (under whom ſhe claimed) to all the tithes in the pariſh of *Lutford* (except ſuch ſmall tithes as the vicar uſually received) and not to the rectory; and the defendant denying the plaintiff's title to the herbage, and the plaintiff not being able to prove any herbage tithe ever paid, though ſhe attempted to prove an unity of poſſeſſion for above ſeventy years, yet the bill was diſmiſſed. *Bunb.* 325.

And finally, in the caſe of the corporation of *Bury* againſt *Evans*, *Trin.* 1739. this point ſeemeth at laſt to have been ſettled; wherein it was determined, that there can be no preſcription *in non decimando*, even againſt a lay impropriator; and that

the preſumption which ariſeth from a conſtant non-payment, will not be ſufficient, unleſs the defendant can ſhew, either that the lands were parcel of one of the greater abbies, diſſolved by the 31 *H.* 8. or that ſome of the impropriators had releaſed the tithes. *Comyns* 643. *Bunb.* 345.

But if a *vicar* ſue for tithes, and the pariſhioner being a layman, denies that the ſaid tithes are due to him; in ſuch caſe, unleſs the vicar ſhall prove that the tithes in queſtion are due to him by indowment or preſcription, he ſhall fail in his ſuit: and the reaſon is, becauſe all the tithes *de jure*, or in preſumption of law, belong to the rector, and therefore the vicar ſhall receive only thoſe tithes which he injoyeth by cuſtom or preſcription, or by the indowment. 1 *Ough. Ord. Jud.* 264.

De modo decimandi.

Modus decimandi is thus deſcribed by lord *Coke*: *Modus decimandi* is, when lands, tenements, or hereditaments, have been given to the parſon and his ſucceſſors, or an annual certain ſum, or other profit, always, time out of mind, to the parſon and his ſucceſſors, in full ſatisfaction and diſcharge of all the tithes in kind of ſuch a place. And this may be pleaded by the lord of a manor, for the tithes of his manor, on account of lands of the gift of one who was lord of the manor, and held by the parſon and his ſucceſſors, time out of mind; and by a pariſh or hamlet, for this or that ſort of tithe, by reaſon of lands injoyed by the parſons time out of mind, within ſuch pariſh, or hamlet; and, laſtly, by any *private perſon*, for his own lands or part thereof, in conſideration of a certain ſum of money, or other recompence. *Gibſ.* 674. *Deg. p.* 2. *c.* 16. 3 *Cro.* 587.

Modus muſt have a reaſonable commencement.

But to make any of theſe a good cuſtom or preſcription, it muſt have the ſeveral qualifications following; as, firſt, every *Modus* muſt be ſuppoſed to have had a reaſonable commencement; and in every preſcription *de modo decimandi*, it is to

be

be intended the rate tithe was the full value of the tithe at the time of the original compoſition; for it cannot be preſumed, that the biſhop, patron, and ordinary, would make a compoſition to the prejudice of the church; and if the *Modus* do not now reach the value, it is to be intended, that either the tithes are improved, or elſe that money is now become of leſs value, which makes the preſent inequality. *Deg. p.* 2. *c.* 16.

By *compoſition real* is meant, where the preſent incumbent of any church, together with his patron and ordinary, do agree by deed under their hands and ſeals, or by fine in the king's court, that ſuch lands ſhall be freed and diſcharged of the payment of all manner of tithes for ever, paying ſome annual payment, or doing ſome other thing to the eaſe, profit or advantage of the parſon or vicar to whom the tithes did belong. And theſe real compoſitions have ever been held and allowed here in *England*, to be a good diſcharge of the payment of tithes. And from theſe real compoſitions it is intended, that all preſcriptions *de modo decimandi* firſt took their riſe and beginning; tho' it is not to be doubted, that moſt of them at this day have grown from the negligence and careleſſneſs of the clergy themſelves. *Deg. p.* 2. *c.* 20.

But now, ſince the ſtatute of the 1 *Eliz.* (in the caſe of archbiſhops and biſhops,) and the ſtatute of the 13 *Eliz.* (in the caſe of all other eccleſiaſtical corporations, ſole and aggregate) it is agreed on all hands, that no *real compoſitions*, any more than *alienations*, can be made; ſince all grants are thereby expreſly reſtrained, and made void, which are not according to the tenor of thoſe ſtatutes. And the only *Modus* that can grow now, muſt be from the inadvertency of the clergy acquieſcing in the ſelf ſame agreements, from one ſucceſſor to another. *Gibſ.* 675, 676.

Where

Where a real compoſition hath been made, if the lands diſcharged thereby be transferred or granted to another, the feoffee or grantee ſhall have the benefit of it. *Gibſ.* 675. *Jones* (*W.*) 369.

But it is not now neceſſary to ſhew, that the *Modus* had at firſt a reaſonable commencement; for theſe *Modus's* having been from time immemorial, none can know but there were ſuch circumſtances in thoſe ancient times, as might have made ſuch a compoſition reaſonable, though at preſent they may not be diſcoverable. It is enough to ſatisfy us, at this great diſtance of time, that the parſon, patron and ordinary, before the reſtrictive ſtatutes, might bind the revenues of the parſon; and that all theſe *Modus's* muſt have had their commencement from an inſtrument ſigned by the parſon, patron and ordinary; but there can be no colour to ſay that, becauſe ſuch inſtrument, in ſo great a length of time, hath been loſt, therefore the *Modus* ſhall be loſt alſo. Indeed ſo far the law hath gone in favour of the church, as that if the inſtrument which the parſon, patron and ordinary had given to a layman, owner of ſuch a farm, to diſcharge the farm of all tithes (though this would be good while the inſtrument could be ſhewn) ſhould be once loſt, this being a privilege *in non decimando*, the privilege would be loſt by the loſs of the deed. 2 *P. Will.* 573. *Gibſ.* 675.

Modus muſt be for the parſon's benefit.

The *Modus* muſt be ſomething for the benefit and intereſt of the parſon, and therefore, the finding ſtraw for the body of the church, the finding a rope for a bell, the paying five ſhillings to the pariſh clerk, the paying a quit-rent to the lord of the manor; when theſe have been urged as diſcharges from tithes in kind, the *Modus's* have been held not to be good. *Deg. p.* 2. 16. *Gibſ. Cod.* 674. *March* 65, 91. 1 *Leon.* 94. *Siderf.* 259.

But

But it is a good *Modus* to be diſcharged, for that he hath uſed, time out of mind, to imploy the profits for the reparation of the chancel; for the parſon hath a benefit by this. 1 *Roll. Abr.* 650.

Modus muſt not be one tithe in lieu of another.

The *Modus* muſt not be, one tithe paid in conſideration of another; as, it muſt not be to pay tithes of other kinds to be diſcharged of tithes for dry cattle; it muſt not be ſo much for every cow and calf for the tithe of herbage. *Gibſ. Cod.* 574. *Deg. p.* 2. *c.* 16.

A bill was brought in chancery to eſtabliſh a *Modus* in favour of the inhabitants of the pariſh of *Sturton*, in *Nottinghamſhire*. The *Modus* was, in conſideration that after the graſs was cut, the pariſhioner, at his own coſts and charges, did make the tithe graſs into hay, by ſtrewing the graſs upon the ground (which is called tedding of it), and afwards gathering it into week and windrows, therefore the perſons that inhabited within this pariſh (which pariſh appeared to be the greateſt part thereof meadow-land) were to pay no tithes for the herbage of dry and unprofitable cattle. But though it was proved in the cauſe, that the pariſhioners, time out of mind, had paid no tithe of this herbage, yet there was no evidence, that this excuſe for not paying tithes of herbage, was in conſideration of the pariſhioners making the tithe graſs into hay. On the other hand it was proved, that foreigners, living out of the pariſh, made the tithe graſs into hay, as well as the inhabitants, and yet paid tithe herbage. And it was proved by the plaintiffs, that the graſs was tedded and ſpread, and not divided into heaps or cocks, until the ſame was made into hay. By *King*, lord chancellor: 1. This may be a good cuſtom or *Modus*, to excuſe the occupier of the ſame land, wherein the pariſhioner made the graſs into hay, from paying tithes for the after herbage; but it can be no good *Modus*, to excuſe the herbage tithe of other land: for at that

that rate, a man might mow and make into hay, only a ſmall parcel of ground, containing a quarter, or half an acre of land, and by this means be excuſed from the tithe herbage of a hundred head of cattle. 2. It ſeems to be a material objection againſt this cuſtom, that foreigners living out of the pariſh, though they have no privilege of being tithe free, as to their herbage, yet have made the tithe graſs into hay; which looks as if it was the uſage of that pariſh, for the pariſhioners to make their graſs into hay of courſe. 3. It ſeems material what ſome of the witneſſes have proved, that in this pariſh the pariſhioners, when they cut down the graſs, did not divide it into ten parts, until ſuch time as they had made it into hay; for of conſequence, the parſon could not have any opportunity of making his tithe graſs into hay himſelf. And the bill was ordered to be diſmiſſed with coſts; but without prejudice as to any litigation that may be made touching the ſame at law. 2 *P. Will.* 520.

Modus muſt be different in kind from the thing that is due.

A *Modus* muſt alſo be ſomething in its kind different from the thing that is due; and therefore a load of hay in lieu of tithe hay, or certain ſheaves of corn for all tithes of corn, is not a good preſcription; but it hath been ſaid, that this holds only in caſe the things are *de jure* tithable, and not by cuſtom only. *Deg. p.* 2. *c.* 2. *Gibſ. Cod.* 675.

The preſcription was, to pay ten fleeces of wool and two lambs in lieu of all tithes; and *Price* and *Bury*, barons, were of opinion that this was an ill *Modus*; becauſe it is one ſpecies of tithe for another; and there is great uncertainty, for one fleece may be twice as big, and three times the value of another. But *Ward* chief baron and *Smith* baron were of the contrary opinion; for that a *Modus* is nothing but a real compoſition for, or in lieu of tithes; or an annual profit certain and permanent: and they held, that the payment of any one chattel for

for tithe, was or might be a good *Modus*, as well as money; for why might not the parſon originally agree to take ten fleeces for his tithe as well as a penny? They admitted that payment of tithe of one ſpecies, or payment of a *Modus* for one ſpecies of tithe, could not be a diſcharge as to another ſpecies; but they held, that this was not a payment of tithe, nor a payment for a ſpecies of tithe; becauſe it was to be paid at all events, whether there be ſheep or no; and they denied the caſe of 1 *Roll. Abr.* 651. and held it no more uncertain than to pay a *Modus* of ten cheeſes, which may differ vaſtly, both in nature, quantity, and value; and it tends to the diſquiet of the country, to break in upon cuſtoms and uſages, and it ought not to be done but on plain and manifeſt reaſon. 2 *Salk.* 656.

Every *Modus* muſt be certain; and if it is uncertain, no length of time will make it good. Thus a preſcription to pay a penny, or thereabouts, for every acre of arable land is void for the uncertainty. 2 *P. Will.* 572. *Modus* muſt be certain.

Thus on a bill to eſtabliſh a *Modus* payable on or about the twenty-fifth day of *April* yearly, it was objected to the uncertainty of the time of payment; and the court allowed the objection; but gave the plaintiff liberty to amend, upon paying the coſts of the day. *Bunb.* 198.

So alſo, a *Modus* to pay four ſhillings for every day's ploughing of wheat, and two ſhillings for every day's ploughing of barley, hath been adjudged to be ill; it being uncertain how much every day's ploughing was. 2 *P. Will.* 462. 2 *Salk.* 657.

So the payment of two Shillings in the pound, of the *improved* rent in lieu of all tithes, was held to be naught; for that is to riſe and fall as the land is lett, and the parſon cannot know it; whereas every *Modus* ought to be as certain, as the duty

duty which is deſtroyed by it. 2 *Salk.* 657. *Ld. Raym.* 1158.

A bill was brought to eſtabliſh a *Modus*; which was laid thus: for payment of ſuch a ſum of money, while the lands are in the hands of the proprietors; but if in the hands of any other perſon, to pay tithes in kind, or the money, at the election of the parſon. Lord chancellor *King* ſaid, that he would never eſtabliſh a *Modus* againſt a parſon without a trial at law, if he deſires it; but this *Modus* is clearly ill, for a *Modus* cannot be deſultory. *Select. Ca. in Chan.* 52.

But in the caſe of *Chapman* and *Monſon*, *Hil.* 1729. a *Modus* that every occupier of land within the pariſh, living out of the pariſh, ſhall pay a penny an acre for all paſture land, within the pariſh, but if he lives within the pariſh, to pay tithes in kind, was adjudged to be a good *Modus*: and this was ſaid to be the leſs unreaſonable, becauſe the tithes are given as a reward for the trouble and care which the parſon takes of the ſouls of his pariſhioners, in which caſe the labourer is worthy of his hire; but then, as the parſon is not bound to go out of his pariſh to viſit thoſe who only occupy land within the pariſh, ſo it is but reaſonable, that they who have not the benefit of the parſon's care ſhould anſwer the leſs duty to him. 2 *P. Will.* 565.

It was ſaid by *Pengelly* chief baron, that in an anſwer to a bill for tithes, it is not abſolutely neceſſary to expreſs the day of payment of a *Modus* inſiſted on, but this may be ſupplied by evidence, ſo as to be a foundation for the court to direct an iſſue at law to try the *Modus*; but in a croſs bill to eſtabliſh a *Modus*, a day muſt be expreſly alleged, otherwiſe it will be fatal. *Bunb.* 328.

And many *Modus's* have been ſet aſide in regard that no day of payment was ſet forth by the defendant; as in the caſe of *Whitehall* and *Offley*, *Trin.*

5 *G.*

5 G. Mr. *Offley* had ſued *Whitehall* in the ſpiritual court for tithes. *Whitehall* moved for a prohibition, and ſuggeſted a *Modus*, but ſet forth no day of payment; for want of which the court was of opinion it was naught.

E. 8 *G. Godard* rector of *Caſtle-Eaton* in *Wilts*, v. *Kable*; the defendant inſiſted upon ſeveral *Modus's*, *viz.* three-pence for a milk cow, three-pence for a lamb, three-pence for a colt, one penny for a garden, and the like; but they were all ſet aſide, in regard no time for the payment thereof was aſcertained by the defendant.

T. 8 *G. Woodford* vicar of *Elbeſhame*, alias *Enſom* in *Surrey*, againſt *Croſſe*. *Modus*, four-pence a cow for milk, and calf; two-pence, for a dry beaſt, three-pence for a lamb; and ſo on; but no day of payment ſet forth by the defendant; ſet aſide for the ſame reaſon.

Penrice, vicar of *Dodderhill* in *Worceſterſhire*, v. *Dugard*. *Modus* of 4*l.* 10*s.* for all ſmall tithes ariſing on an eſtate called *Impry*; ſet aſide becauſe no day of payment was ſet forth by the defendant in his anſwer.

Pemberton vicar of *Belchamp St. Paul's* in *Eſſex*, againſt *Sparrow* and others; ſeveral *Modus's* ſet aſide for the ſame reaſon.

T. 8 *G. Corpus Chriſti* v. *Vincent*. *Modus*, 1 ½ for a young milk cow, and two-pence for an old milk cow; ſet aſide for the ſame reaſon.

And the reaſon theſe decrees go upon is, that tithes in kind, being a proviſion made by law for the clergy, which become due at a certain determinate time, and which if not then ſet forth are immediately demandable, ſhall not be taken from them by an uncertain payment, which becomes due on no determinate day, and which they cannot know when to demand, or go about to receive, if it be withheld. Beſides that ſuch an uncertainty lays a foundation for many diſputes; as in the caſe of

of the death of an incumbent when tithes are paid in kind, all tithes ſevered before his death go to his executor, the reſt to his ſucceſſor; but if a *Modus* to be paid on no certain day ſhould be allowed, no one could determine in that caſe whether it ſhould go to the executor of the preceding incumbent, or to the ſucceſſor. But it ſeemeth to be now held, where an annual *Modus* hath been paid, and no certain day for the payment thereof is limited; that the ſame ſhall be due and payable on the laſt day of the year. 2 *B. Ecc. L.* 395.

Modus muſt be ancient.

A *Modus* muſt be ancient; and therefore if it is any thing near the preſent value of the tithe, it will be ſuppoſed to be of late commencement, and for that reaſon will be ſet aſide, as in the caſe of *Benſon*, impropriator of *Bromley St. Leonard*, *Middleſex*, againſt *Watkins* and others. *H.* 3 *Geo.* The following *Modus*, viz. 5*s.* an acre for tithe of winter corn, 4*s.* an acre for ſummer corn, 2*s.* 6*d.* an acre for upland meadow, and 3*s.* an acre for low land, were ſet aſide as too big.

So in the caſe of *Lloyd*, vicar of *Epping* in *Eſſex*, againſt *Small* and others, 4 *G.* The defendants inſiſted on ſeveral *Modus's* for all ſmall tithes ariſing out of their reſpective farms; but it appearing by their anſwer, that their ſmall tithes in kind, in the year demanded by the bill, did not amount to more in that year than the pretended *Modus's*, the *Modus's* were ſet aſide.

Trin., 2 *G. Franklin*, *Jenkins* and others. The bill was brought by the pariſhioners of *Farnham* in *Hampſhire*, againſt the vicar and tenant of the impropriator there, under the hoſpital of *St. Croſs*, to eſtabliſh ſeveral *Modus's*, amongſt other things; ſome of which were ſet aſide as too big, and among the reſt a pretended *Modus* of 6*d.* for the tithe of a calf.

So

So in the case of *Layfield*, rector of *Chiddingford*, in *Surrey*, against *Eaknap*, two shillings and sixpence for a tithe lamb, was some years ago set aside as too big for a *Modus*. And the reason these decrees go upon is this: That the value of money being much greater at the time when all *Modus's* are presumed to have begun, than it is now, a *Modus* near the value of the tithes at this day must have been at that time a great deal more; and it is not to be supposed, that the parishioners would at any time give so much more than the value of their tithes. 2 *B. Ecc. L.* 396.

Modus must be durable.

A *Modus* must be something durable; because the tithe in kind is an inheritance certain, and it is against nature that it should be extinguished by a recompence not as durable at least, though not so valuable; for this reason, four pence to be paid yearly, by two persons inhabiting two such houses, in consideration of all tithes, hath been adjudged ill; because the houses may decay, or none live in them. *Gibs.* 675. 1 *Cro.* 139.

Modus must be without interruption.

Custom or prescription must be constant without interruption, and perpetual, from the time whereof the memory of man is not to the contrary; for if there had been frequent interruptions, there can be no custom or prescription obtained; but after a custom or prescription is once duly obtained, a disturbance for ten or twenty years shall not destroy it. *Deg. p.* 2. *c.* 13.

Modus how destroyed.

As every consideration will not make a good *Modus*, so a *Modus*, though founded upon good consideration, may be several ways discharged, and tithes become due in kind: (1) Where land is converted to other uses; so when the prescription is for hay and grass, specially, in so many acres of land; if the land is converted into a hop-garden or tillage, the prescription is gone. (2) By the alteration or destruction of the thing, for which the money was paid; as where two fulling mills

were under the ſame roof, and turned into a corn-mill; where alſo there was one pair of ſtones in a mill, and another pair was added; and where the water-courſe was altered by the owner, and the mill was pulled down and re-edified upon it; in all theſe caſes, it was adjudged that the *Modus* was gone. But where a man was ſeiſed of eight acres of meadow, and one of paſture, for the tithes whereof he had paid time out of mind, five ſhillings and four-pence, and afterwards the owner built a corn-mill upon the ſame; it was adjudged that he ſhould pay no other tithes for the corn-mill, becauſe the land was diſcharged by the *Modus*. 2 *Inſt.* 490. *Gibſ.* 675. 1 *Rol. Abr.* 651. (3) By non-payment of the conſideration, or payment of tithes in kind, for ſo long a time, as to deſtroy the poſſibility of making proof that ſuch cuſtom or preſcription was: but an interruption for ſome ſhort time only, will not diſcharge it; eſpecially if made by the leſſee, to the prejudice of the leſſor. *Watſ. c.* 47. *Gibſ.* 675. 2 *Bulſt.* 240.

Modus how to be tried.

The rule is, that the *Modus* is to be ſued for in the eccleſiaſtical court, as well as the very tithe; and if it be allowed between the parties, they ſhall proceed there; but if the cuſtom be denied, it muſt be tried at the Common law; and if it be found for the cuſtom, then a conſultation muſt go; otherwiſe the prohibition ſtandeth. The like is affirmed, in caſe a jury upon an iſſue joined in a prohibition upon a *Modus decimandi*, find a different *Modus*; ſince a *Modus* is found, they ſhall not have a conſultation. 2 *Inſt.* 490. *Gibſ. Cod.* 691.

The principal reaſons why the courts of Common law prohibit the ſpiritual court from trying of *Modus's*, are, that whereas every *Modus* is leſs than the real value, the rule of the canon law is,

is, that leſs than the real value ſhall not be taken, and that a cuſtom to the contrary is void; and that the eccleſiaſtical and temporal laws differ in the times of limitation; forty years or under making a good cuſtom by the eccleſiaſtical laws, whereas by the temporal laws, it muſt be beyond the time of memory. *Gibſ. Cod.* 691.

But the ſpiritual courts have commonly allowed, and do allow, pleas of *Modus decimandi*; and the averment in the prohibition is not, that they do take cognizance, but that the plea hath been offered and refuſed; which ſuppoſeth, that if the plea be admitted, the prohibition ought not to go. And accordingly it hath been affirmed, by *Doderidge* and others, that the ſpiritual court may as well try the *Modus*, as the right of tithes, and that a prohibition is not to be granted, till the ſpiritual court either refuſe to admit the plea, or proceed to try it by methods different from the rules of the temporal law, as to the time of limitation, or number of witneſſes, or the like. And where lord *Coke* contended for the contrary doctrine, it was declared by *Kelynge* and *Twiſden*, in the caſe of the biſhop of *Lincoln* againſt *Smith*, that in caſe one libel for a *Modus decimandi*, if the ſpiritual court allow the plea, they may try it. *Gibſ.* 691.

But, notwithſtanding, it ſeemeth now to be clearly ſettled, that if a *Modus decimandi* be ſued for in the eccleſiaſtical court, a prohibition lies to ſtop the trial of it, if the *Modus* be denied; and the reaſon is, not upon the account that the ſpiritual court wants juriſdiction, but in regard of the notion the temporal law hath of cuſtom different from the ſpiritual. And ſeeing that every *Modus* is due by cuſtom, it is the Common Law only that can determine, what time and uſage with us ſhall be ſufficient to create ſuch a cuſtom, that is, time beyond all memory to the contrary. Whereas, by

the ſpiritual law, ſometimes ten years, ſometimes twenty, they will adjudge ſufficient to create a cuſtom. And prohibitions in ſuch caſes are granted, not becauſe the ſpiritual court hath not juriſdiction of the matter, but in reſpect of the trial, which is to be by the temporal law only; and if upon the trial it be found for the *Modus*, the proceedings ſhall go on in the ſpiritual court; if againſt the *Modus*, the prohibition ſhall ſtand. *Watſ. c.* 56.

Coſts of trying a *Modus*.

There having been two verdicts in this caſe in favour of the plaintiff in equity, the *Modus* was now eſtabliſhed with the coſts at law, but none were given with regard to proceedings in equity; for lord *Chancellor* ſaid, the ſuit in this court was merely for the ſecurity of the plaintiff, and to prevent any farther impeachment of his right to an *exemption* from the payment of tithes in ſpecie; and that this was like the caſe of a bill brought to perpetuate the teſtimony of witneſſes, wherein coſts are never given againſt the defendant: that the plaintiff might have applied for a prohibition, and if he had ſucceeded therein at law, he would have had his coſts, and he ought to have the ſame advantage with regard to the *proceedings at law*, directed by this court; but that there was no pretence for any other coſts. His lordſhip decreed the *Modus* to be eſtabliſhed, and ordered the defendant to pay coſts to the plaintiff, in reſpect to the proceedings at law, to be taxed; but as to coſts in equity, relating to the *Modus's*, *his lordſhip* did not think fit to award any to be paid by either of the ſaid parties. In *Chan. Jan.* 28th 1737. By lord *Hardwicke*. Atkins's Rep. 610.

CHAP.

CHAP. IV.

An alphabetical table or index of things tithable, and not titheable.

ACORNS (which are included in the name of *Maſt*) are the chief of thoſe things, which the ancient laws call *Pannage*. *Gibſ. Cod.* 676. Acorns.

Maſt of oak or beech, if ſold, the tenth penny is payable for the tithe thereof; but if eaten by ſwine, then the tenth value or worth thereof. *Godol.* 417. And ſo *Lindwood* ſaith, if the ſaid fruits ſhall be ſold, there ſhall be paid the tenth penny: and if they be not ſold, but the hogs do feed thereupon, then the owner of the hogs ſhall pay the tithe according to the value of ſuch fruits. *Lindw.* 290.

There is a writ of conſultation in the Regiſter for the tithe of pannage. And lord *Coke* (11 *Rep.* 49. *a.*) ſays, for *acorns* tithes ſhall be paid, becauſe they renew yearly. And in *Reynold's* caſe, *Trin.* 2 *Jac.* 1. it was ſaid, that of *acorns* ſevered tithes are payable. *Gibſ.* 676.

But where the caſe was, that the acorns dropt from the trees, and the hogs eat them, a diſtinction was made, that they ſhall not be tithable, unleſs gathered and ſold. *Het.* 27. *Litt.* 40. *Gibſ.* 676.

In ſhort, the caſe of acorns ſeemeth not different from that of other things tithable; if gathered, they ſhall pay tithes in kind; and the tenth penny, or two ſhillings in the pound, in all ſuch like caſes, is not to be conſidered as exclusive of the tithes to be paid in kind, but only as a reaſonable ſatisfaction, when the pariſhioner diſpoſeth of his whole produce unſevered. And where the acorns are not gathered by the owner, but ſuffered to be fed upon

as they drop; the caſe ſeemeth to fall under the ſame equity, as where turnips are fed upon by unprofitable cattle, for which an agiſtment tithe ſhall be paid. 2 *B. E. L.* 423.

After-eatage. If a man pay tithes of Corn, he ſhall not pay any tithes for the after-paſture of that land for that ſame year, nor for agiſtment in ſuch after-graſs. 1 *Rol. Abr.* 641.

But if, after the crop is taken off, the land ſhall be ſown with turneps, he ſhall pay tithes of ſuch turnips: for that is a new increaſe. *Bunb.* 314. 8 *Vin. Abr.* tit. *Diſmes Z.*

After-math or after-mowth. The general rule in this caſe is laid down by *Rolle*, who ſays, that of after-mowth, that is, the ſecond mowth, tithes ſhall be paid *de jure*, without a ſpecial preſcription to be diſcharged by payment of the tithes out of the firſt mowth, and then it ſhall be diſcharged. 1 *Roll. Abr.* 640.

But Sir *Simon Degge* ſays, that tithes are not to be paid of the after-mowths of meadows: but if the meadowing be ſo rich that there are two crops of hay got in one year, there the parſon ſhall have tithe as well of the latter as of the former crop. *Deg. p.* 2. *c.* 3.

But if the occupier of the land can preſcribe, that in conſideration the owner doth make the firſt tonſure into good and ſufficient hay, and ſet it forth in cocks ſufficiently dried, then he ſhall be diſcharged of the tithes of the after-mowth; this is a good preſcription and diſcharge, by reaſon of the labour and coſt, he beſtowed in making the firſt tonſure into hay. See 1 *Rol. Abr.* 648. 1 *Cro.* 404. 3 *Cro.* 660. 2 *Cro.* 42, 116. *Moor* 910.

Or if the preſcription be, to be diſcharged of the tithe of the after-mowth, only upon conſideration that they have uſed, time out of mind, to cut down the graſs of the firſt mowth, and the ſame to tedd and ſhake abroad, and the ſame graſs ſo diſperſed and caſt abroad to gather into wicks and windrows,

and put it into ſmall cocks at their own coſts; this is ſufficient, though it be not made into perfect hay. *Cro. Jac.* 42.

And in the caſe of *Norton* and *Brigs*, *Trin.* 9 *Will.* 3. it was ſaid by *Treby*, Chief Juſtice, that tithes are not payable for after-mowth *de jure*; that therefore it is but form to lay a cuſtom to be diſcharged of tithes of after-mowth, in conſideration of making the former mowing into hay; for tithes are payable only of things renewing once in the year. L. *Raym.* 242. L. Ray. 242.

If a man pay tithes of hay, it is ſaid, that no tithes ought to be paid *de jure* afterwards, for the paſture of the ſame land for the ſame year; for he ſhall not pay tithes twice in a year for the ſame thing: for the after-paſture is only the relicks of the hay, of which he hath paid tithes before. 2 *Inſt.* 652. 1 *Rol. Abr.* 640. Nor for agiſtments in ſuch after-graſs. 1 *Rol. Abr.* 640. *Bunb.* 1, 7. But this is to be underſtood, where no more graſs is left by the ſcythe than is uſual; for if more graſs than uſual is fraudulently left, the caſe is otherwiſe. 2 *Bulſt.* 238. After-paſture.

If an inn-keeper pay tithes of hay of certain land, and the reſt of the year afterwards, putteth into the ſame land the horſes of his gueſts, which come to market there, in the ſame town; it is ſaid, no tithes ſhall be paid for the herbage of thoſe horſes, for this is only the after-paſture of the land, whereof he hath before paid tithes. 1 *Rol. Abr.* 641. *Gibſ. Cod.* 676.

Agiſtment is the feeding of cattle upon paſture land, which pay no other tithes; and is ſo called from the *French*, *geyſer*, giſter, [*jacere*] lie; becauſe the beaſts are levant and couchant, that is, lying and riſing. So *Agiſter* in a foreſt, in an old verſion of the *charta de foreſta*, is called *gyſt-taker*. 4 *Inſt.* 293. *Ken. par. Ant. Gloſs.* Agiſtment or paſturage.

Tithe of agistment of cattle is due of common right, because the grass which is eaten, is *de jure* tithable, and must have paid tithe, if cut when full grown. 1 *Rym.* 137. 2 *Salk.* 655. 2 *Inst.* 651. 4 *Mod.* 336. *Comb.* 403.

The general rule with respect to agistment is, that it is to be paid for beasts agisted for hire; or for dry or barren cattle, that do otherwise yield no profit to the parson; and not for cattle which are nourished for the plough or pail, and so employed in the same parish; because the parson hath tithe for them in another kind. 2 *Inst.* 659. *Dig. p.* 2. *c.* 5.

But if a foreigner that lives in another parish, depastures ground for cattle bred to the plough and pail, to be employed in a foreign parish; he shall pay tithe for the agistment of such cattle. *Dig. p.* 2. *c.* 5. 1 *Rym.* 119.

Also if the same cattle are turned off to be fatted, and are grazed, there tithes of agistment shall be paid; since they are no way beneficial to the parson in any other tithes. And so of cows after they are become barren, and are fatted for sale. *Gibs.* 676. *Show. Ca.* 193.

The like is to be said of horses; that while they are kept for the use of husbandry, no tithe shall be paid: But if horses be kept for sale, or to carry coals, or for the like offices which are profitable to the owner, and not profitable to the parson, tithe shall be paid for them. *Gibs.* 676. *Popl.* 126. 2 *Cro.* 439. 1 *Heth.* 93. 1 *Rol. Abr.* 646.

But saddle horses shall pay no tithes, no more than cattle for the plough and pail, or cattle killed for the use of a man's own family, in respect of the profit that otherwise accrues to the parson from these. *Bunb.* 3. 1 *Rol. Abr.* 641.

But if they be horses of travellers, or others taken in as guest horses; it is agreed by all, that tithe agistment is due, because no profit otherwise accrues

crease to the parſon from them. *Gibſ. Cod.* 682. 1 *Bulſt.* 174. *Poph.* 126.

In the caſe of *Thorp* and *Bendlowes*, in the Exchequer, *T.* 1762. *Thorp*, as rector of *Houghton* in the county of *Durham*, filed his bill againſt *Bendlowes* (amongſt other things) for the tithe agiſtment of his coach-horſes, ſuggeſting, that the horſes were not kept for pleaſure only, but that the defendant made a profit of them, by employing them to fetch his coals at ten miles diſtance out of the pariſh, and in loading manure, brick and wood, from the pariſh of *Houghton* to the defendant's lands in the pariſh of *Darlington*, which is the next adjoining pariſh; which fact was proved in the cauſe. The defendant by his anſwer inſiſted, that the horſes were kept for his coach, and for pleaſure only, and were not liable to pay any tithe for agiſtment, as barren and profitable cattle. The court were unanimouſly of opinion, that coach-horſes were liable to pay tithe of agiſtment, and decreed the defendant to account for the ſame, and to pay plaintiff his coſts. 2 *B. E. L.* 408.

If a man pay tithes in kind to the parſon, for his lambs, fleeces, and other things, going and ariſing upon his paſtures, waſtes, or other lands; it is ſaid, that he ſhall not afterwards, in the ſame year, pay tithes of agiſtment for the ſame paſtures, waſtes, or other lands. 1 *Rol. Abr.* 641.

But in the caſe of *Coleman* and *Barker*, *E.* 1726. where the ſuit was for the tithe of agiſtment of ſheep, which were depaſtured on turneps, remaining on the ground unſevered, it appeared that the defendant had paid tithe wool, and after ſhearing time, fed his ſheep with turneps, by which they were bettered five ſhillings a ſheep; and tithes were decreed for the depaſturing of thoſe ſheep. *Gilb.* 231.

And the like was decreed in the caſe of *Swinſen* and *Digby*, *H.* 1731. *Bunb.* 314. for in ſuch caſe, the

the ſheep being turned off to be fatted, ceaſe to be profitable to the parſon in any other way.

The tithes for depaſturing unprofitable cattle ought to be paid by the occupier of the ground, and not by the owner of the cattle. *Bunb.* 3.

For if the occupier of the ground were not in ſuch caſe made liable, it would be greatly inconvenient for the parſon to ſue every owner of the beaſts; and perhaps it would be hard to be known, and infinite. 1 *Rol. Abr.* 656. *Deg. p.* 2. *c.* 5.

But if it is a common that is depaſtured, the owner of the cattle (if known) muſt pay the tithes, and not the owner of the ſoil; becauſe the owner of the ſoil hath no profit by it. *Bunb.* 3.

And if tithe of agiſtment be denied, ſuit may be commenced in the ſpiritual court againſt the occupier of the land, or in caſe they are gueſt cattle, either againſt the occupier of the land, or owner of the cattle; and no prohibition will lie. *Gibſ. Cod.* 677. *Jones* (*W.*) 254. *Hard.* 184.

As to the manner of paying tithe for agiſtment, where no ſpecial cuſtom is, if it be paid for gueſt cattle taken in, it is ſaid, that the tenth part of the money received is payable for agiſtment; if for the owner's cattle, then the tithe ſhall be according to the value of the land, after the rate of two ſhillings in the pound: For that they cannot otherwiſe be valued, or accounted for, becauſe the profits of the lands for which they are paid, are received by the mouths of the beaſts. *Gibſ. Cod.* 677. *Hard.* 184. *Watſ. c.* 50.

But by cuſtom, or preſcription, ſuch tithes may be paid in other manner, as by the acre, and for all manner of cattle together, or the like. *Watſ. c.* 50. *Gibſ. Cod.* 677. *Skin.* 560. 2 *Salk.* 665. *Carth.* 392. *Bunb.* 5.

It was ſaid by *Holt*, Ch. J. in the caſe of *Hicks* and *Woodſon*, 6 *Will.* and *Ma.* that tithes of barren

ren cattle are due *de communi jure*, and two ſhillings *per pound* is the uſual tithe of common right, though there are divers *cuſtomary* manners of tithing for them. And the plea, that no tithes had ever been paid within ſuch a hundred, for the agiſtment of any cattle not uſed for the plough or pail, was rejected, and the cuſtom was declared a void cuſtom, and conſultation granted. *Gibſ. Cod.* 677.

Where profitable and unprofitable cattle feed together, tithe ſhall be paid in kind for the profitable, and agiſtment for the unprofitable. *Gibſ.* 677.

In the caſe of *Smith* and *Roocliff*, *H.* 1717: The barons were of opinion, that a *modus* of one ſhilling in the pound for paſture, according to the value of the land, was a void *modus*; as is alſo a *modus* of one ſhilling in the pound, according to the value of the rent. *Bunb.* 20. And the like was adjudged in the caſe of *Harriſon* and *Sharp*. *Trin.* 1724. *Bunb.* 174.

It was adjudged, *Ann.* 5 *Jac.* 1. that tithe of alders ſhall be paid, although they be of twenty years growth, and more. *Gibſ. Cod.* 677. 2 *Cro.* 199. Aldern.

This is frequently mentioned in the endowments of vicarages, as that which the vicar ſhall have for his maintenance; and upon ſuit in the Exchequer, 21 *Eliz.* concerning the rights of the vicar of *Weſthaddon*, whoſe endowment was *altaragium cum manſo competenti*, it was determined (according to the definition of *altaragium*, given by the lord biſhop of *London*, upon conference with the judge of the admiralty, the dean of the arches, and four other doctors of the Civil law) that by altarage, were underſtood tithes of *wool*, *lambs*, *colts*, *calves*, *pigs*, *goſlings*, *chickens*, *butter*, *cheeſe*, *hemp*, *flax*, *honey*, *fruits*, *herbs*, and ſuch other ſmall tithes, with *offerings*, that ſhall be due within the pariſh of *Weſthaddon*. Altarage.

haddon. The like alſo had been determined in the ſame court, in the caſe of *Norton* in *Northampton-ſhire*, two or three years before. *Gibſ. Cod.* 677.

Apples. In the fourth year of *Char.* I. libel was in the ſpiritual court for tithe of two pecks of apples: and the owner of the orchard praying a prohibition, upon ſurmiſe that he had but two pecks in all, and they were ſtolen; the court reſolved, that if the owner ſuffered another to pull his apples, the parſon ſhall have tithes; but otherwiſe, if they be taken by perſons not known, (for they are not tithable before plucking) unleſs they are taken after the proper time of gathering, through the neglect of the owner in letting them hang too long. *Gibſ. Cod.* 677. *Hetl.* 100.

Aſh. This is agreed on all hands to be timber, and ſo to be free from tithes, being of or above twenty years growth. *Gibſ. Cod.* 677. See *Wood.*

Aſp-trees. In the ſeventeenth year of *Jam.* I. a prohibition was prayed, in a ſuit of aſp-trees, in *Buckinghamſhire*; and it was granted, becauſe in that country, where timber is ſcarce, aſp, beech, and other like trees, ſerve for timber; and of aſp-trees the court ſaid, as a reaſon why they ought not to pay tithe, that they ſerve for arrows for defence of the realm: a circumſtance, which, it is to be hoped, will not now be judged ſufficient ground of exception in other counties where it is not uſed for timber. *Gibſ. Cod.* 677. 2 *Rol.* 83.

Bark. Bark, where the tree is a timber-tree, ſhall pay no tithe; being privileged by the *body* of the tree. See *Timber*. *Gibſ.* 677.

Barren land. What is, and is not barren land, and by conſequence ſtands diſcharged; is particularly ſhewn before in *page* 17 to 21.

Beans and Peaſe. If a man gather green peaſe to ſpend in his houſe, and there ſpend them in his family, no tithes ſhall be paid for the ſame; but if he gather them to ſell, or to feed hogs, there tithes ſhall be paid for them. 1 *Rol. Abr.* 647. *Deg. P.* 2. *c.* 3. *Mathew*

Mathew Nicholas Clark, vicar of *Shalford*, in *Hilary* Term 10 *Anne*, preferred his bill in the court of *Exchequer* againſt *Elliot* the farmer of the impropriate rectory (among other things) for the tithes of peas and beans; and alſo preferred his bill in the ſame court afterwards againſt *Auſton*, eſquire, the impropriator, and had a decree for the ſame, though it was inſiſted by the defendants, that the vicar was only intitled to the tithes of peas and beans ſet and planted in rows and ranks, that have been hoed and weeded with the hand, where the ground has been turned with the ſpade, as well in open fields as in gardens; but not where they have been ſet in rows and ranks, and hoed and weeded with the hand, where the ground has been turned only with the plough: from this decree there was an appeal to the houſe of lords, and it was there affirmed 24 *January* 1717. *Bunb.* 19.

Tithes of beans and peas ſet and planted in rows are ſmall tithes.

Bill by the plaintiff as leſſee of the vicar of *Thiſtleworth*, for tithes of peas and beans ſet and ſowed in rows, drilled, hoed, and hand-weeded in a garden-like manner, againſt the leſſee of the impropriator (the Dean and Chapter of *Windſor*) as being a ſmall tithe: the defendant inſiſts, that a great part of the pariſh is converted into this method of cultivation, and that this tithe was never paid to the vicar, but always to the impropriator. Two caſes were quoted by Mr. *Amyrant* for the plaintiff; firſt, *Stephens* v. *Martin*, *Hil.* 7 *W.* 3. which was affirmed upon an appeal to the houſe of lords; ſecond, *Nicholas* v. *Elliot*: To which it was anſwered by *Serjeant Stephens* and Mr. *Ward*, for the defendant; as to the firſt, that it did not appear (in that caſe) the impropriator conteſted it, nor what the indowment was; and as to the ſecond, there was a proof of uſage by the vicar for forty or fifty years receiving tithe peas and beans, where plough and ſpade were uſed; but where the plough only was uſed, the impropriator received them.

Tithe of beans and peas ſhall be paid to the impropriator, if the vicar doth not ſhew an indowment or uſage to the contrary.

them. And *per Curiam*; There being no indowment produced, nor uſage proved in the preſent caſe, the bill was diſmiſſed as to the demand of peas and beans. *June* 11, 1724. *Bunb.* 169, 170.

It hath been diſputed, whether the tithe of beans and peas, gathered by the hand, and ſold for man's food, is a great or ſmall tithe. As in the caſe of *Sims*, vicar of *Eaſtham* in *Eſſex*, againſt *Bennet* and *Johnſon*, occupiers of lands within the ſaid pariſh, and *Wilks* and *Hitch*, impropriators of the rectory of the ſaid pariſh; *December* 6, 1762. Mr. *Sims*, the vicar, brought his bill in *Chancery*, in the year 1756. ſetting forth, that by the indowment of the vicarage, he is intitled to the tithes of gardens and curtilages, and all ſorts of tithes, except the tithes of ſheaves, and hay and mills, [*præter decimas garbarum et fœni et molendinorum ad ventum*]; that the defendants, *Bennet* and *Johnſon*, holding ſeveral parcels of land in the ſaid pariſh, did in the ſame year, cultivate pieces of ſuch land with beans and peaſe, of ſuch ſort as are generally uſed for the food of man, which they gathered in the months of *June*, *July* and *Auguſt*, by the hand, in the field, by plucking them from the ſtalk whilſt green, and ſent the ſame to market, and ſold them for the food of men accordingly; and inſiſting, that by the gathering beans and peaſe by the hand, ſo cultivated as aforeſaid, he, the ſaid *Sims*, as vicar, by virtue of the ſaid indowment, became intitled to the tithe thereof, and that no tithe ought to be paid for the ſame to the impropriator; nor ought beans and peaſe, ſo cultivated and gathered by the hand, by plucking from the ſtalk whilſt green, to be conſidered as part of the tithes appropriated to the rectory. To this bill the defendants put in their anſwers. And the defendant *Bennet* ſaid, that in the year 1756, he ſowed thirteen acres, or thereabouts, with peaſe and

and beans, in the open fields in the ſaid pariſh, and believed that in *June*, *July* and *Auguſt* in the ſame year he gathered ten acres and half, or thereabouts of the ſame, by the hand in the field, by plucking them from the ſtalk whilſt they were green, and ſold them in a cart by retail, by pecks and ſmaller quantities, in and about the pariſh of *Eaſtham*, and in the ſtreets of *London*; and the remainder of ſuch peas and beans were gathered into the barn, and threſhed. And the defendant *Johnſon* ſaid, that he ſowed five acres of beans and peas in like manner, and part thereof he plucked by the hand when green, and ſold the ſame in *London* ſtreets, and at market, and gathered the remainder into the barn. And both the ſaid defendants ſaid, that all their ground in the ſaid pariſh, ſowed with peaſe and beans in the ſaid year, was ploughed for that purpoſe, and no part thereof was dug with a ſpade, except under or near the hedges, where the ſame could not be ploughed, or in ſuch places as were too wet to be ploughed; and that the tithe of all beans and peaſe, whether gathered green or otherwiſe, having been always paid to the rector, and eſteemed to belong to him, they had therefore compounded with the impropriator for the ſame, and hoped they ſhould not be compelled to account alſo with the vicar for the ſame tithes. The defendants, *Wilkes* and *Hitch*, in their anſwer, inſiſted on their right as impropriators. Witneſſes were examined on both ſides; ſeveral of whom depoſed, that ſuch peaſe and beans as are uſed for the food of man had been cultivated in the fields and grounds of the pariſh of *Eaſtham*, only for about thirty years paſt, and were cultivated and gathered green off the ſtem, as uſually done in a garden (ſave only that in the field, the plough hath been generally uſed, and in the garden the ſpade,) and in rows, but in a different manner from thoſe planted and

ſowed

ſowed in fields, in the common courſe of husbandry for provender, and not for man's food. And one of the witneſſes, Mr. *Wyat*, vicar of the pariſh of *Weſtham*, (adjoining to that of *Eaſtham*), ſaid, that in the year 1753, he commenced a ſuit in *Chancery* againſt the impropriator and others of his ſaid pariſh for ſuch tithes, and that the then lord chancellor decreed in his favour, and he hath enjoyed the ſaid tithes ever ſince. On hearing, the lord keeper *Henley* decreed, *November* 10, 1760, that the vicar's bill ſhould be diſmiſſed, without coſts: upon this, Mr. *Sims* appealed to the houſe of lords, ſetting forth the following reaſons. 1. It is admitted by the reſpondents, that if the tithe of beans and peaſe, cultivated in a garden-like manner, and gathered by hand whilſt green, is a *ſmall* tithe, the ſame is not included in the exception out of the vicar's indowment. Many arguments may be offered to prove it ſuch. The quality of all tithes is to be determined at the time of ſeverance, when the right accrues. The ſame thing which produces a great tithe in one ſtate, and mode of culture, produces a ſmall tithe in another. If clover is cut for hay, it is conſidered as a great tithe; when ſuffered to grow for ſeed, it is conſidered as a ſmall tithe. This is alſo the caſe of tares; when cut green, they are referred to the claſs of ſmall tithes; when matured and dried before cut, they are referred to the claſs of great tithes.

The tithe in queſtion is certainly not a tithe of corn or grain, and it bears two marks of a ſmall tithe; the one, that it is in the nature of a garden tithe, being diſtinguiſhed out of the deſcription, not by difference of culture, but merely by the locality of ſetting beans and peas in fields; the other, that it is a new and modern culture. 2. Suppoſing the tithe in queſtion to be a *great* tithe; ſtill the vicar was intended to be indowed with it, becauſe it is not included in the exception out of his

his indowment. Peas and beans plucked by the hand, whilſt green, from the ſtem, however cultivated, or wherever planted, can never be tithed under the deſcription of *decimæ garbarum*. *Spelman*, in his gloſſary, interprets *garba* to be *faſciculus*, either of fruits or wood. *Du Freſne* calls it *Spicarum Manipulus*. And *Matthew* of *Weſtminſter* ſaith, *frumenti manipulus, quem patriæ lingua dicimus* ſheaf, *gallice vero garbam*. But the tithe in queſtion cannot fall under the meaning of the word *garba*, being ſet out and taken by a meaſure totally different. 3. It doth not ſeem an objection of weight to the appellant's demand, that if tithes are paid to the vicar for peaſe and beans gathered green, another tithe will be claimed by the rector, when the ſtalks ripen and are cut down, by which means a double tithe is ſaid to be payable for the ſame thing. This will appear otherwiſe, when the matter is conſidered not in the light of paying two tithes for one thing, but of dividing the ſame tithe between two different owners, according to the grant of appropriation. The vicar will have his tithe of what is actually gathered green, and the rector of what is left, after it ſhall be cut down. 4. It is ſubmitted to be an objection of as little weight as the objection juſt anſwered, namely, that in conſequence of the appellant's reaſoning, the farmer will have it in his power to determine the property of tithes between rector and vicar, from the manner or place of culture, or time of gathering. But this is a contingency, which attends this ſort of right; the occupier being allowed by law to cultivate his lands, as he and the landlord ſhall think proper; which makes tithes, in their own nature, a fluctuating and uncertain inheritance. On the other hand, the reſpondents hope the decree will be affirmed, for theſe (amongſt other) reaſons. 1. Becauſe a vicar cannot claim tithes of any kind but by indowment,

or by uſage (which is only evidence of an indowment). In this caſe, there is no evidence of uſage; and therefore if the vicar is not intitled to the tithes in queſtion under the indowment, he is not intitled at all. But, 2. By the indowment, the tithes in queſtion are excepted out of the grant to the vicar; for the words *decimæ garbarum*, in the exception, have been always conſidered as technical terms, appropriated to, and deſcriptive of great tithes, to diſtinguiſh them from ſmall tithes. And *garba*, in its ſignification, comprehends peaſe and beans growing in fields, as well as all other ſorts of corn and grain growing in fields, ſo that peaſe and beans are in their own nature a great tithe, and excepted out of the vicar's indowment in this caſe, under the name of *garba*. 3. As to the objection, that in the preſent caſe, the peaſe and beans being plucked green, and ſold for the food of man, they are applied to the ſame uſe as beans and peas growing in gardens, which are a ſmall tithe; and that this tithe ought to take its denomination from the uſe the thing titheable is applied to, and therefore is a ſmall or vicarial tithe, and not within the meaning of *decimæ garbarum:* it is anſwered, that all the caſes relative to tithes, taken together, ſerve to prove, that the law denominates and adjudges tithes to be great or ſmall, according to the nature of the thing, and not from the mode of cultivation, or uſe to which the thing is applied. And therefore in this caſe, the application of the peaſe and beans in queſtion for the food of man, they not being, not falling under the denomination of tithes of gardens, technically called *decimæ hortorum*, ought not to convert the tithes in queſtion into ſmall tithes. And, after a full hearing, *December* 6th, and 7th, 1762. the lords affirmed the decree. 2 *B. E. L.* 400.

This

This, by the Common law, is not timber, and ought therefore to pay tithe, of what growth ſoever it be; but where it hath been pleaded, that by reaſon of the ſcarcity of timber in this or that country, (particularly in *Buckinghamſhire,*) they are forced to uſe it for timber, the court hath adjudged it to be privileged by the ſtat. of *Sylva Cædua*. *Gibſ.* 677. 1 *Rol. Abr.* 640. 1 *Mo.* 541. 1 *Rol.* 355. 2 *Rol.* 83. Beech.

In a bill for tithes of wood by the rector of *Whipmeed* in the county of *Bedford*; the queſtion was, whether beech was eſteemed timber in this country, which went to an iſſue to try. *Vide* the caſes cited, *Plow. Com.* 470. 2 *Juſ. Com. ſur le Stat.* 45 *Ed.* 3. *Stat.* 35 *H.* 8. *Cro. Jac.* 100. *Moor* 908. 2 *Cro.* 199. 1 *Roll. Abr.* 640. *p.* 5. 1 *Inſt.* 53. *Bunb.* 192.

Though theſe are reckoned among the things that are *Feræ Naturæ*, and, by conſequence, tithe-free; yet, being gathered into hives, and become the *property* of particular perſons, it ſeems unreaſonable to rank them in that number. However, it hath been adjudged, that they ſhall not be paid in kind, by the tenth ſwarm; but that the tenth meaſure of *honey*, and the tenth pound of *wax*, ſhall be ſufficient. *Gibſ.* 677. 1 *Rol. Abr.* 651. 3 *Cro.* 404. Bees.

Ann. 5 *Jac.* 1. it was held by the whole court, that tithes of birch ſhall be paid, although of twenty years growth, and more; and after ſome adviſement, conſultation was awarded: and *Coke* cited one *Leonard*'s caſe, 34 *Eliz.* to be ſo adjudged. *Gibſ.* 677. *Mo.* 907. 2 *Cro.* 199. Birch.

This is reckoned by lord *Coke* among other things which ſhall not pay tithe, becauſe, *of the ſubſtance of the earth*, and not *annual*; and it is ſaid, that 18 *Eliz.* a prohibition was granted to ſtay ſuit for bricks in the ſpiritual court, upon ſuggeſtion of the *general immunity*; which hath alſo been confirmed, and upon the ſame ground, by a latter judg- Brick.

ment. Nor ſhall tithe be paid of the wood cut down for burning of bricks, ſo far as ſuch bricks are applied to the *repair*, or neceſſary *inlargement* of the owner's houſe; which circumſtance it is (and not the exemption of the *bricks*) that gives privilege to the wood. 2 *Inſt.* 651. *Gibſ.* 678.

Broom. It was held in the caſe of *Price* and *Maſcal*, 12 *Jac.* 1. that broom is tithable; notwithſtanding it was ſaid to be dug up in order to bring the land to tillage, which in the end would be for the benefit of the parſon. But when it was ſuggeſted in the court of *King's Bench*, 28 *Car.* 2. That the defendant in the ſpiritualcourt did keep a houſe of huſbandry, and uſed the broom to burn; the plea was admitted, and prohibition granted. *Gibſ.* 678. 2 *Bulſt.* 240.

Calves. The tenth calf is due to the parſon *de Jure communi*, to be taken when it is weaned, and not before; and it is recoverable in the ſpiritual court, as appears from a writ of conſultation in the *Regiſter*. And in caſe there are fewer than ten, it hath been adjudged a good cuſtom, (and the cuſtom evidently ſprung from the canon law,) and if there are ſeven, the parſon ſhall have one calf; if under ſeven, then a half-penny, or what cuſtom ſhall direct for each calf. But whereas the canon law leaves it to the choice of the parſon, when there are under ſeven, whether he will proceed in that manner, or let them run on till one becomes due in the inſuing year; the Common law will not allow of this, becauſe tithe muſt be paid *annually*; and ſo, when the parſon ſued for a ſeventh calf becoming due in that manner, prohibition was granted. *Gibſ. Cod.* 678. 1 *Rol. Abr.* 648. *Latch* 254.

In the caſe of *Egerton* and *Still*, *T.* 1725. it was decreed, that where there are above ten calves, lambs, piggs, or the like; the tithe of the odd number above ten ſhall be paid according to the value, and not be carried over to the next year. *Bunb.* 198.

A cuſtom of paying the tenth part of the price for every calf that is ſold, is a good cuſtom. *Gibſ.* 678. 1 *Rol. Abr.* 648.

The diſtinction of cattle, as tithable, or not tithable, hath been already ſettled under the head of agiſtment; and it may be a general rule, that ſuch cattle as be diſcharged from tithe of agiſtment, are (conſidered *per Capita*, and not in their product,) diſcharged from all other tithe, and have a right to plead an abſolute immunity; but cattle within the pariſh being liable to the tithe of agiſtment, are alſo liable to any other cuſtomary tithe. *Gibſ. Cod.* 678. 3 *Cro.* 786. Cattle.

The payment of tithes for other cattle which are liable to tithes, (as lambs, colts, calves, *&c.*) is not a ſufficient ſurmiſe to be diſcharged of the tithes of dry cattle in general; becauſe ſuch payment is not more than what was due, and cannot therefore be in ſatisfaction for the tithe of any other thing. *Gibſ. Cod.* 678.

In the caſe of *Fox* v. *Hyde*; where the point was, to eſtabliſh a *Modus*, for the nonpayment of tithe for the herbage of dry and unprofitable cattle, in conſideration that after the graſs was cut, the pariſhioner at his own coſt and charges did make the tithe-graſs into hay; though it was proved that the pariſhioners time out of mind had paid no tithe of this herbage; yet the court held it to be a material objection againſt the *Modus*, that foreigners being out of the pariſh made the tithe graſs into hay, and yet paid tithe herbage; and that it would be too much in a court of equity to eſtabliſh this *Modus*; eſpecially, where it was inſiſted on, (as in this caſe,) that the pariſhioners making tithe-graſs into hay, did not only excuſe the herbage of that ground from tithe-herbage, but alſo all the tithe-herbage that the pariſhioner was to pay for any land he depaſtured within the

pariſh, though it might be a great parcel of paſture-land, and though the ſame might be fed all the year. *Gibſ.* 678. 2 *P. Will.* 520.

Although the tenth colt, calf, or lamb be paid; yet if any of the reſt be reared, and ſold before they yield profit to the parſon, or be uſed for the plough, a tithe ſhall be paid of them. *Gibſ.* 678. *Hetl.* 86.

An inhabitant in one pariſh has arable lands in another; and reſolved that he ſhall only be excuſed from payment of agiſtment for the cattle depaſtured in that other pariſh; ſo far as they are actually imployed in ploughing in the other pariſh, for the parſon ought to have ſomething in lieu of the loſs of thoſe tithes, which can only be of the plowing of the acres in the neighbouring pariſh. 1 *Ld. Raym.* 129.

Tithe of cattle feeding upon waſtes or commons, where the bounds of pariſhes are uncertain, ſhall be paid to the incumbent where the owner inhabiteth (as is expreſly provided in ſtat. 2 *Ed.* 6. *cap.* 13.) unleſs by cuſtom or preſcription they be limited to ſome certain incumbent. *Gibſ. Cod.* 678. *Sav.* 60.

Chalk. This, as being of the ſubſtance of the earth, and part of the freehold, hath been declared and adjudged not to be tithable. 2 *Inſt.* 651. 1 *Mod. Rep.* 35. 2 *Keb.* 596.

Cheeſe. Tithe of cheeſe can only be due, where tithe is not paid of the milk; and payment of the tenth cheeſe in one part of the year (as from *May-day* till the firſt of *Auguſt*), may be a good preſcription for diſcharge of tithable milk for the *whole* year. *Gibſ. Cod.* 678. 1 *Cro.* 608. *Mo.* 909.

In the *Regiſter*, a conſultation is provided where prohibition hath been granted, in caſe of tithe-cheeſe. *Gibſ.* 678. *Reg.* 49.

Bill

Bill by the rector of *Radnage* in the county of *Buckingham*, for the tithe of black cherries and other things. As to the black cherries the defendant inſiſted they grew wild in hedges and waſte places, and ſerved for fencing his grounds: But the defendant was decreed to pay the tithe of theſe cherries. *Mich.* 1724. *Bunb.* 184. Cherries.

In the ſeventeenth year of *James* I. theſe were adjudged to be timber, in *Buckingſhamſhire*, and other parts where other timber is ſcarce; and, as ſuch, to be diſcharged of tithes. *Gibſ.* 678. 2 *Rol.* 83. Cherry-trees.

Upon a prohibition to ſtay ſuit in the ſpiritual court, for tithe chicken; it was reſolved, that they were not tithable, becauſe the eggs were tithed. *Gibſ.* 678. 2 *Rol.* 83. Chicken.

This is diſcharged of tithe, as being of the ſubſtance of the earth. 2 *Inſt.* 651. *March* 58. Clay.

In the caſe of *Wharton* and *Liſle*, it was ſaid by *Dolbon* and *Eyres* in the King's Bench, that it had been ruled at the aſſizes, that if a man ſow his land with clover, and make his profit of the ſeed, this being a grain, the parſon ſhall have a tithe of it; but if he convert it into hay only, and make his profit of the hay, the vicar being endowed of tithes of hay, ſhall have it as a ſmall tithe. *Gibſ.* 405. *Skin.* 341. Clover.

The court ſeemed to think, that clover and vetches cut green, and given to cattle uſed in huſbandry, ſhould pay no tithes. *Bunb.* 279.

Doctor *Watſon* ſays, the tithes of clover *graſs* ſhall go to him that hath the tithe hay. *Watſ. c.* 39.

And in the caſe of *Franklyn* and the maſter and brethren of St. *Croſs*, *T.* 1721; the vicar being endowed of tithe hay, it was decreed, that he was thereby intitled to clover, ſaintfoin, and rye graſs; which are ſpecies of hay, which is the genus. *Bunb.* 79.

But the *ſeed* of clover in its nature is a ſmall tithe. *Watſ. c.* 49.

Thus in the caſe of *Wallis* againſt *Pain* and *Underhill*, *H.* 1738. a bill was exhibited in the Exchequer by the plaintiff *Wallis*, who was tenant or farmer under the impropriator of the great tithes in the pariſh of *Prittlewell* in *Kent*, and inſiſted that the defendant *Pain* ſowed a field with clover which was cut for hay, and that he let the aftermath grow for ſeed, which was cut and threſhed for ſeed, of which the plaintiff ought to have the tithe as a great tithe. The defendant *Pain* inſiſted, that he had paid to the plaintiff for the tithe hay of his clover; and that the aftermath of clover ſtood for ſeed, which was a ſmall tithe, and payable to the vicar. And Mr. *Underhill*, the vicar, inſiſted upon the tithe of clover ſeed as a vicarial or ſmall tithe. By the depoſitions of ſeveral witneſſes it appeared, that the difference between clover cut for hay, and that cut for ſeed, is conſiderable; when made into hay, it is cut while the graſs is green, and fit for cattle to eat; when cut for ſeed, it ſtands till the ſtalk is good for little or nothing, and the ſeed is the only thing of value, or regarded. It was argued for the plaintiff, that clover ſeed is in the nature of it a great tithe, and therefore due to the plaintiff; for as tithe hay is due to him, the ſeed of that hay muſt of conſequence belong to him alſo; that where the parſon is intitled to tithe hay, he will be intitled to the hay made of clover, as well as of other graſs; and if to the hay, likewiſe to the ſeed. On the other ſide it was inſiſted, that clover ſeed is in its nature a ſmall tithe; that the tithe of no ſeed was ever looked on as a great tithe; and as to what was ſaid, that the ſtalk and ſeed ſhould go together, it is frequent that the ſeed or fruit of trees goes to the vicar, when the tree goes to the parſon: Wood is always reckoned a great

great tithe, and goes to the rector, unleſs the vicar be ſpecially endowed with it; but acorns, as well as the fruits of all other trees, are always held as ſmall tithes. Lord chief baron *Comyns* delivered the reſolution of the court, That by the Canon-law, as long as the diſtinction hath been made between great and ſmall tithes, which is as ancient as appropriations to the religious houſes, who uſually ingroſſed the great tithes, but left the ſmall tithes to the curate, all ſeeds have been reckoned as ſmall tithes. The Common law ſeems to follow the Canon law in this point. And all the reſolutions, relating to tithes, which proceed from things newly introduced into *England*, have held them to be ſmall tithes; as ſaffron, woad, flax, hops, tobacco. As to clover ſeed, there doth not appear to have been any expreſs determination in this point: But it is a ſeed; and all ſeeds are mentioned as ſmall tithes. It is true, that clover graſs made into hay is of the nature of all other graſs made into hay, and conſequently muſt belong to the parſon, or other who is intitled to tithe hay; but it does not follow, when it ſtands for ſeed, and is not made into hay, that the ſeed may not be ſmall tithes. Rape ſeed, carraway ſeed, turnep ſeed, muſtard ſeed, are ſmall tithes; but if the herb be growing with other graſs and made into hay, it would be great tithe. And all the barons agreed in opinion, that the plaintiff's bill ſhould be diſmiſſed: Baron *Parker* ſeemed to doubt, as it partook of the nature of the ſtalk, from whence it was taken. *Comyns* 633.

And it hath been decreed, ſince this caſe, that the ſeed of clover is a ſmall tithe. *Bunb.* 344.

A *Modus* may extend to clover, although of late only brought into *England*, if the *Modus* be ſuch as covers all tithes of hay. *Bunb.* 20.

This is one of the things which lord *Coke* exempts from payment of tithes, as being of the ſubſtance Coal.

of

of the earth, and not annual; and therefore tithe being due only by cuſtom, a prohibition hath been granted to ſtay ſuit for it in the ſpiritual court; once, 13 *Jac.* 1. and again 18, 19 *Car.* 2. *Gibſ. Cod.* 678. 2 *Inſt.* 651. 3 *Bulſt.* 114. 2 *Keb.* 177.

Colts. Theſe are tithable, in the ſame manner as calves; which ſee before. There is in the *Regiſter*, a conſultation, among other things, *de pullanis provenientibus de equitio ſuo.* Gibſ. Cod. 678. Reg. 49.

And generally, the *time* of payment of the tithe of calves, colts, kids, pigs, and ſuch like young cattle, is when they are ſo old that they may be weaned, and live without the dam upon the ſame food that the dam eateth; unleſs the cuſtom of the place confine the payment to any certain time or age. *Deg. p.* 2. *c.* 6.

Conies. Upon this head, the books generally ſay, that conies, though the property of particular perſons, for the ſtealing of which an action lies, yet being *Feræ Naturæ*, are not tithable of common right, and that therefore when they are ſued for, it muſt be upon the foot of cuſtom; for which reaſon prohibition hath generally gone. But in the caſe of *Jones* and *Gaſtrel*, it was ſaid by *Doderidge*, and agreed to by the court, that tithe ought to be paid of conies; by which general expreſſion they muſt mean, *of common right. Gibſ. Cod.* 678. 2 *Rol.* 458. 1 *Keb.* 602. 2 *Keb.* 141, 452.

It hath been ſaid, that the diſtinction in this caſe, is, that conies *ſpent in the houſe* ſhall not pay tithe, but ſuch as are ſold ſhall pay; which diſtinction I find frequently uſed in the caſe of pigeons, but it hath not, I think, been directly applied to conies; though it may be ſo applied with as good or better reaſon, conſidering the great profits which uſually ariſe to the owners, from warrens. *Gibſ.* 679.

In the caſe of *Walton* and *Tryon*, 1751, a bill was brought by the plaintiff (amongſt other things) for the tithe of rabbits, in a warren called *Aſhurſt*'s warren. And he proved by the former incumbent's book, that the ſame had been compounded for, by payment of twenty ſhillings in money, and four couple of rabbits. For the plaintiff it was argued, that it is a great queſtion, whether this be a predial, mixt, or perſonal tithe. Cuſtomary tithes are generally deemed perſonal tithes; and if ſo, then a payment in lieu of tithes will be good. Rabbits are of that nature, that they are difficult for the parſon to get them, the times of taking them uncertain, and therefore a ſmall compoſition probably was taken for them. Suppoſe a compoſition was made for hay, originally at 5*l.* and afterwards a new agreement was made for 4*l.* and one load of hay: this would be good, and an *Aſſumpſit* would lie. The parſon's book proves, that ſeveral couples were paid, and money alſo; and that book is always held to be good evidence.—For the defendant it was anſwered, that this tithe can only depend on a cuſtomary immemorial right; and ſo ought to be laid in the bill. Here it is laid, to the tenth of the rabbits in kind; and the plaintiff demands it as ſuch. But his evidence is directly contrary. For by that he proves a compoſition in lieu of tithes for them. Therefore, as his evidence contradicts his manner of laying his preſcription, he muſt fail in his ſuit. As to the rector's book in this caſe it is very modern; for it goes no further back than the year 1728. This indeed may be evidence of payment, but it can never be admitted as an evidence to ſupport the right. By the lord chancellor *Hardwicke*: The plaintiff by his bill demands tithes in kind, but there is no evidence of that. The evidence offered is, that four couple of rabbits have always been ſent and delivered at the parſon's houſe by the

warrener, and twenty ſhillings a year paid, and ſo proved by the former incumbent's book. And the argument by the plaintiff from this evidence is, that this is a compoſition for tithes in kind, and rightly argued, for the *Modus* would be too rank. But the great thing with me is, this twenty ſhillings a year. For the four couple of rabbits can neither be *Modus* nor compoſition. Indeed, payment of part of a thing in money, and part in kind, has been held to be good. But I can determine nothing on this queſtion: but it muſt go to be tried as to the cuſtom. 2 *B. E. L.* 434.

Copper-mill. See *Mill.*

Cuſtom. See *page 33 to 52.*

Deer. Theſe are ranked by my lord *Coke* among the things that are *Feræ Naturæ*, and therefore not tithable, without ſpecial cuſtom. And this continues to be the current doctrine; notwithſtanding the large tracts of lands taken up by them, (which might otherwiſe yield great profit to incumbents,) and the difficulty the law makes in avoiding the *Modus*, when ſuch tracts come to be *diſparked.* *Gibſ.* 679. See *Park.*

Dotards. Dotards, or old decayed trees, having been once privileged, as *Sylva Cædua*, ſhall not pay tithes, though afterwards they become rotten, and are cut down for the fire: and yet it is certain, the foundation of the privilege, (*viz.* their uſefulneſs in the way of timber) is gone; and ſo the privilege, if it ſubſiſt at all, muſt ſubſiſt without foundation; and though *More* reports the caſe as clearly determined, *Coke* ſays the court was divided. *Gibſ.* 679. *Mo.* 908. 2 *Cro.* 101.

Doves. Theſe being kept in a dove-houſe, may pay tithe, by cuſtom. *Gibſ.* 679. 1 *Vent.* 5.

Eggs. It was adjudged, 14 *Jac.* 1. in the caſe of *Lee* and *Collins*, that the paying 30 eggs in lent, is a good *Modus* for all tithes of eggs. But the general rule is, that where tithe is not paid of chickens, there

there it is due of eggs; and the *Modus* juſt now mentioned, ſeems to croſs the rule of the law, that every *Modus* ought to be ſomewhat (as to kind) different from the thing that is due. If a certain number of ſheaves, for all corn; or a load of hay for all hay, 'tis ill; it ſeems by no means clear, how thirty eggs for all eggs can be good; allowing them to be things that are *de jure* tithable, which is not denied. But the diſtinction here taken is, that the thirty eggs are to be paid whether he has hens or no, and alſo are to be paid at a certain time; and ſo that payment, in the manner of it, differs from the payment of the tithe. 1 *Rol. Abr.* 648. 2 *Salk.* 656.

Per Holt Ch. J. Where the cuſtom is to pay 30 eggs in lent, the cuſtom binds the pariſhioner to the payment of ſo many at that time; and whether he have hens or not, he is obliged to it; ſo that he may be obliged to buy eggs, to pay the parſon; and that makes it a good cuſtom. But if the cuſtom was that he ſhould pay 30 eggs of his own hens, the cuſtom would be ill. *Ld. Raym.* 360.

This is agreed on all hands to be timber, and Elm.
within the privilege of *Sylva Cædua*, or wood of twenty years growth, ſo as to pay no tithe, if it be of or above twenty years growth. *Gibſ. Cod.* 679. See *Wood*.

Upon a motion for a prohibition, the caſe was, Fagots.
The defendant libelled in the ſpiritual court for tithes of fagots made of loppings of trees; and the ſuggeſtion for a prohibition was, that theſe loppings were cut from the ſtumps of timber-trees above the growth of twenty years. And it was alleged, that ſentence was given in the ſpiritual court, and therefore the plaintiff comes here too late, to have a prohibition. But *per Holt* Ch. J. The ſentence will not hinder the having a prohibition in any caſe, but in caſe of prohibitions grounded upon 23 *Hen.* 8. *cap.* 9. for citing out of the

Dioceſe. But becauſe the plaintiff had not pleaded this matter in the ſpiritual court, they denied the prohibition; becauſe the ſpiritual court has a general juriſdiction of tithes, and if any ſpecial matter deprives them of their juriſdiction, it muſt be pleaded there. And if it had been pleaded there, and iſſue joined upon it, and upon the trial it had been found not to be *Sylva Cædua*, it had been well. But if they had refuſed to admit the plea, a prohibition ſhould have been granted. *Mich.* 1 *Ann. Dike* v. *Brown*, *Ld. Raym.* 835.

Fallow. It was held, 7 *Jac.* 1. in *Smith*'s caſe, that if the parſon hath had tithe-corn one year, and the land lies fallow, without ſowing, the next year, in order to be ready for plowing or ſowing the third year; that the parſon ſhall not have tithe for the ſecond year: and a very good reaſon is given for it, becauſe its lying fallow meliorates the land, and gives the parſon a larger tithe, the third year. *Gibſ. Cod.* 679. 1 *Rol. Abr.* 642.

But in the next reign, 15 *Car.* 1. it was ſaid by *Barkley*, juſtice, that if the occupier of the land will not plow and manure tithable lands, thereby to prejudice the parſon; in ſuch caſe, the parſon may ſue in the eccleſiaſtical court to have tithes of that land, which is a juſt and reaſonable conceſſion; but ſuch is the difficulty of proving intentions, that, in reality, it amounts to little. *Gibſ. Cod.* 676.

Fenns. Theſe, being drained, ſhall not be privileged for the firſt ſeven years, under the name of *barren-land*. *Gibſ. Cod.* 679. See *p.* 20 *to* 22.

Fern. See *Heath*.

Fiſh. This tithe hath been declared, in its nature, to be perſonal; and therefore not to be taken in kind (or by every tenth fiſh,) but by a juſt conſideration in money, *deductis expenſis*; as was affirmed in the caſe of *Goſlin* and *Harding*, 14 *Car.* 1. Upon which foundation it was ſaid by *Doderidge*, that

that if the owners of a ſhip do lend it to mariners to go to an iſland for fiſh, and are, in conſideration of ſuch loan, to have a certain quantity of fiſh when they come back; no tithe ſhall be paid by the mariners for what is given to the owners, becauſe they are only to pay for the *clear gain*. But, by cuſtom, fiſh may be payable in *kind*, (though leſs than the tenth will do, becauſe not *de jure* tithable,) as was adjudged (1 *Jac.* 1.) in the caſe of *tithe pilchards*, where the tithe of one moiety (in kind, as I ſuppoſe,) was declared a good cuſtom for the whole; and of other fiſh at *Yarmouth*, where the owner's part was to be firſt ſeparated, then the reſt divided into ten doles, and the tenth dole to be divided between the parſon and the town; and in the caſe of *Sheppard* and *Penroſe*, where the payment of the twentieth fiſh was adjudged to be good. *Gibſ. Cod.* 679. 1 *Rol. Abr.* 656. 1 *Lev.* 179.

It is ſaid that no tithe can be demanded of fiſh caught in the ſea, becauſe they are in no certain pariſh; which diſtinction cannot be meant of *taking tithe in kind*, becauſe that is as expreſly denied of fiſh in *rivers*, that they are tithable *de jure*, though within the precincts of certain pariſhes, and taken by one who hath a particular *fiſhery*: and therefore as the *ground* of the exemption in both, ſeems to be one and the ſame, (*viz.* that fiſh are *Feræ Naturæ*, and not tithable *de jure*, but upon the foot of *cuſtom* only,) ſo with regard to the *perſonal tithe* that is due, it ſeems to make no difference that fiſh at ſea are in *no pariſh*, as long as the fiſherman *dwells* and *lands* in a *pariſh*. *Gibſ. Cod.* 679. 3 *Cro.* 339.

In the caſe of the earl of *Deſmond*, where fiſh in a river are declared not to be tithable *de jure*, the river is deſcribed under the particular circumſtance of a *common river*, and *not incloſed*; which ſhews, that it was then thought, that fiſh in *ponds*, and

and in *rivers incloſed*, and *not common*, were not to be reckoned *Feræ Naturæ*, but to be *de jure* tithable; and that then being the *property* of particular perſons, who had the benefit of them, was a good reaſon why they ſhould be tithed. *Gibſ. Cod.* 679. 1 *Rol. Abr.* 636.

A bill was preferred by the earl of *Scarborough* for the tithe of fiſh due by cuſtom, which cuſtom was laid for all fiſh taken at ſea, and brought to land and ſold within the pariſh of *Hort*, of which the plaintiff was the impropriate rector; ſecondly, for all fiſh ſold at ſea, and the veſſel came back to the pariſh; thirdly, for fiſh taken by the inhabitants, and ſold at another port: although the plaintiff did not prove his cuſtom as laid in the bill, yet *by three barons againſt the chief baron*, an iſſue was directed to try, Whether there was ſuch cuſtom as laid in the bill, or whether any and what cuſtom; though it was ſaid, there never was any inſtance, where either the plaintiff or defendant inſiſted upon a *Modus*, or cuſtom, and did not prove it, that ever it went to a trial at law, it being eſſential to a *Modus*, or cuſtom, that it be certain. It was alſo objected, that the cuſtom was illegal as it was laid; for if it is a perſonal tithe, as inſiſted upon (and as the court ſeemed to think), then a double tithe may be payable, not only in another port where the fiſh is ſold, but alſo where the fiſher inhabits; to which *three barons againſt the lord chief baron* ſaid, it was a good cuſtom; for one tithe may be paid by cuſtom, and one of common right. *Bunb.* 43.

Bill for tithe of fiſh according to cuſtom; the plaintiff in his bill ſet forth a former decree eſtabliſhing this cuſtom in the pariſh *tempore Car.* 2. and though there ſeemed to be no evidence by the defendants againſt the cuſtom, and the plaintiff had the former decree ſigned by above one hundred and thirty pariſhioners, teſtifying their acquieſcence in the decree; yet the court ſent the plaintiff

plaintiff to an iſſue, *Reluctante* baron *Hale*, *Trin.* 1727. *Bunb.* 239.

Bill for tithe fiſh payable by cuſtom to the impropriator.

A bill was preferred by the plaintiff as impropriator of the rectory of *Pauli alias Paulin* in the county of *Cornwall* for the tithe of fiſh, and inſiſted upon this cuſtom, *viz.* that every pariſhioner of the ſaid pariſh and others, being proprietors or occupiers of any fiſhing boat, fiſhing net, or other fiſhing craft, which has been uſually tied, moored or kept within any part of the rectory or pariſh (when not uſed in fiſhing) ought to pay to the impropriate rectors the tenth part of all great and ſmall fiſh taken in the bay, or adjoining ſeas, with ſuch boats, nets or fiſhing craft, except fiſh uſed for bait for fiſhing, and fiſh meaſhed in the ſleeves of nets, called ſaynes: And the plaintiff ſet forth in his bill a decree obtained by his grandfather againſt one hundred and thirty pariſhioners, which was made upon a very ſolemn hearing, wherein all the then moſt learned counſel in *England* were engaged on one ſide or the other, and whereby the cuſtom, as now alledged (except only as to the exception of fiſh meaſhed in the ſleeves) was eſtabliſhed. (But *nota*, the bill in 1680. alledged the cuſtom to be for inhabitants, *&c.* alone, and not "or others, *&c.*")

The plaintiff alſo now inſiſted, that a year after the decree one hundred and thirty of the then defendants, by indorſement on the decree, acknowledged the cuſtom, and there had been an acquieſcence ever ſince until the year 1722, which was about forty years.

The defendants inſiſted, firſt, That they ought not to be bound by this decree, there being only two of the preſent defendants who were defendants in the former cauſe. Secondly, That the cuſtom did not extend to driving nets, which of late years had been moſtly uſed, and ſaynes neglected. Thirdly, That it was unreaſonable to extend to inhabitants

and others, and into adjoining ſeas out of the pariſh; and therefore prayed an iſſue.

But the plaintiff's counſel inſiſted, that here was ſufficient foundation for a decree without ſending it to an iſſue; Firſt, The former decree being ſo ſolemnly obtained; Secondly, The indorſement by one hundred and thirty of the then defendants, two of which were now alive, and defendants to this bill: Thirdly, Conſtant uſage and acquieſcence ſince until the year 1722.

The lord chief baron, and baron *Comyns*, ſeemed to think this a ſufficient ground to decree for the plaintiff; but the other barons (*Q. Hale* baron) doubting, and upon great importunity of the defendant's counſel an iſſue was directed to be tried at the bar, to try the cuſtom as laid in the bill, which came on to be tried at *Weſtminſter in cur' ſcacc' November* 6, 1728; and upon the trial (which laſted fourteen hours) there was a verdict for the plaintiff, though the defendants gave pretty ſtrong evidence, that drift nets were as ancient as ſaynes, and no tithes had ever been paid for drift fiſh. (*Nota*, drift nets were looked upon as a fraud upon the cuſtom;) but the authority of the decree (when the matter was fully conſidered) and an acquieſcence for forty-one years ſince, was too ſtrong to be got over; and the verdict was to the ſatisfaction of all the court, but baron *Carter*. The defendants appealed from this decree to the houſe of lords, which was there heard *February* 26th 1729, when the decree was affirmed. *Bunb.* 256, 257, 258.

Flax. This was adjudged to be a *ſmall* tithe, 14 *Car.* 1. in *Noah Webb*'s caſe; and in the caſe of *Wharton* and *Liſle*, 5 *Will. & Ma.* was declared to continue ſo, notwithſtanding its being ſown in large fields. *Gibſ. Cod.* 680. 1 *Rol. Abr.* 637. 2 *Lev.* 365. *Shin.* 341, 355. *Carth.* 263. See *Hemp.*

Foreſt. As lands which are in no pariſh, pay tithes to the crown, ſo lands lying within the precinct of a foreſt, (though

(though alſo in a pariſh) if in the hands of the king, do pay no tithes. But if a foreſt be *diſafforeſted*, and within a pariſh, it ſhall pay tithes; becauſe the not paying tithes, in the hands of the king, was an immunity for *that time only*, while it remained a place for *deer*; and was in the hands of a perſon, who might preſcribe *de non decimando*. Accordingly, in the caſe of *Comyns* it was expreſly declared by the court; "That a foreſt in the hands of a *ſubject*, "ſhall pay tithes." *Gibſ.* 683. *Sty.* 137. 1 *Rol. Abr.* 655. *Hetl.* 60.

Under this name are commonly underſtood, *hens*, *geeſe*, *ducks* and *turkies*; and though the laſt of theſe have been declared *feræ naturæ*, and not tithable, (for what reaſon, is not ſaid;) yet no queſtion hath ever been made concerning the other three, but that they are to pay tithes, either in *eggs*, or in the *young*, (according to cuſtom;) but not in both. *Gibſ. Cod.* 680. *Mo.* 599. 1 *Rol. Abr.* 642. Fowls.

It is ſaid to have been adjudged 15 *Car.* 1. that if a fowler kill fowl, and make profit of them, he ſhall pay a *perſonal* tithe. *Gibſ. Cod.* 680.

This comprehends *apples*, *pears*, *plums*, *cherries*, and the like; concerning which there is no queſtion, but that, when gathered, tithe in kind is due. But as to fruit-trees, my lord *Coke* ſays, that if they have paid tithe-fruit, and be cut down, and ſold in billet or fagot, they ſhall not pay tithe, *for the fruit and tree be not of ſeveral kinds*: but in the mean time, it is certain, that they yield *profits* of ſeveral kinds; and in theſe caſes, the profit to the owner, is the foundation of tithe to the parſon. *Gibſ. Cod.* 680. 2 *Inſt.* 652. Fruit.

It was adjudged in the caſe of *Auſtin* and *Lucas*, that no tithe ſhall be paid for fuel of any kind, that is ſpent in the pariſhioners own houſes. *Gibſ. Cod.* 680. 1 *Cro.* 609. *Mo.* 909. Fuel.

Furzes. If the defendant in ſuit for *furzes*, keeps houſe of huſbandry, and makes it appear that he uſed the *furzes* for fuel, or to make *pens* for his ſheep, no tithe ſhall be paid: But otherwiſe, if ſold. *Gibſ. Cod.* 680. 1 *Mod.* 609. 3 *Keb.* 635. *Littl.* 267.

Bill by the vicar of *Eynſham* in the county of *Oxford* for ſix years tithe herbage and *furze*, of a cloſe called *Amberry*, *alias Hanborough* cloſe in the pariſh of *Eynſham*: The defendant inſiſted, that they did not know that the vicar was intitled to theſe tithes, that they were informed no tithes thereof ought to be paid to the vicar; but that the great tithes, *herbage* and *furze*, (if any was due) belonged to the impropriator; and then ſay, that it was part of the diſſolved abbey of *Eynſham*, and exempted by the ſtatute 31 *Hen.* 8. The plaintiff made out by his proof, that the vicar was intitled to all ſmall tithes within the pariſh; that the great tithes were conſtantly paid to the impropriator, and gave one inſtance within thirty years of a compoſition with the vicar for the agiſtment tithe of this cloſe. The defendant's proof was negative, that they never knew tithe paid for this cloſe; and although it was objected, that a vicar ſhould have made out a fuller title to the ſmall tithes, yet the court were of opinion it was ſufficient; and decreed the defendant to account. *Hil.* 1723. *Bunb.* 144, 145.

Gardens. Out of gardens is paid tithe of all garden-herbs and plants, as *parſley*, *ſage*, *cabbage*, *turneps*, *ſaffron*, *woad*, and the like, which are ſmall tithes, and may be demanded in kind; but, ordinarily, ſome certain conſideration is paid for theſe things, either by cuſtom, or by agreement with the parſon. If the cuſtom be a parochial cuſtom, or extending to gardens throughout the pariſh, the enlargement of a garden doth not make tithe due *in ſpecie*; but otherwiſe, if it was a ſpecial preſcription for this or that garden. And the ſame thing is to be ſaid of *orchards*. *Gibſ. Cod.* 680.

All

All the garden ground in *England* ſhall pay tithes for different crops; and turneps when they are pulled out to pay tithes, though never ſo often ſowed, and though upon the ſame land. *Bunb.* 10.

Beſides what hath been ſaid of the tithe of geeſe, under the title fowl, (which ſee) we find that the feathers of old geeſe ſheered, and young, were libelled for; and to obtain a prohibition, a *Modus* was ſuggeſted, that a young gooſe with the feathers, was paid the firſt of *Auguſt* yearly, in full of tithe of all geeſe and feathers. And geeſe being *de jure* tithable, and this maxim (that a *Modus* ſhall be ſomewhat different from the thing, of which tithe is to be paid) being alſo eſtabliſhed, a remarkable expedient was hit on, that the keeping a gooſe feathered till the firſt of *Auguſt*, was more than the pariſhioner was bound to by law: Upon which prohibition was granted. *Gibſ. Cod.* 680. 3 *Keb.* 705. Geeſe.

It was reſolved, 5 *Car.* 1. that a glaſs-houſe, the profit of which grows by the labour and induſtry of man, ſhall not pay tithe in kind. *Gibſ. Cod.* 680. *Littl.* 314. Glaſs-houſe.

Divers things, as to graſs ſtanding, have been ſaid under the tithe of agiſtment; but with relation to graſs mowed, this may be added, which was reſolved, 9 *Car.* 1. in the caſe of *Crawley* and *Wells*, that if one cut down graſs, and while it is in ſwaithes before he makes it into hay, carry it away, and give it to his labouring cattle, (not having ſufficient ſuſtenance for them otherwiſe) no tithe ſhall be paid of it; which is expreſly againſt the Common law of the church, as delivered by *Lyndwood*; *De herbâ viridi, etiam non ſiccatâ, ſi ſic ſumatur vel neceſſaria ſit ad pabulum animalium vel beſtiarum, ſolvenda eſt decima.* Graſs.

And (to mention a caſe ſomewhat like this) when the inhabitants of divers marſhes and fenny lands, who uſed to gather a rough hay, called fenny-fodder, for want of ſufficient graſs to ſuſtain

their beaſts in winter, alledged that they did this for the ſuſtenance of their beaſts, and the better increaſe of their huſbandry, and ought therefore to be freed from the payment of tithes; the court held, "That this furmiſe was not ſufficient; for one may "not preſcribe *in non decimando*; and in that it is "alledged, they beſtow it upon their cattle there, "that is not any cauſe of diſcharge; ſo they may "preſcribe for corn ſpent in their family, or for "corn given for provender to their cattle; where-"by no tithes ſhould be paid." *Gibſ.* 680. 2 *Inſt.* 651. 1 *Mod. Rep.* 35.

Gravel. This is one of the things, which are exempted by the general rule, as being of the ſubſtance of the earth; according to the maxim of my lord *Coke*, and alſo a later reſolution. *Ann.* 21 & 22 *Car.* 2. *Gibſ.* 680.

Haſle. The tithe of *haſle*, *holly*, *willow*, *whitethorn*, *&c.* being ſued for in the ſpiritual court, prohibition was moved, and (as it ſeems) obtained, upon theſe ſuggeſtions, that they were of twenty years growth and more, and by the common cuſtom of the place, were uſed for timber to build and repair their ploughs. *Gibſ. Cod.* 680. *Nov.* 31.

Hay. *Modus's* have been pleaded for diſcharge of payment of all tithe for hay, in conſideration of one or more loads of hay; and when it hath been objected, that this, being a recompence of the ſame kind, could not be a good *Modus*, they alledged further, that the owner had not only cut down the parſon's ſhare, and ſet it out in graſs cocks, but had alſo made it into hay for him, which was more than by law he was bound to do; and that, in conſideration of his labour, he ought to be diſcharged; in which caſe, 13 *Jac.* 1. the *Modus* was denied by *Coke* and the other juſtices, becauſe the making it into hay was no more than what by law he was bound to do. Accordingly the thing, which the antient conſtitutions of the church of

England make payable to the parſon, is *decimæ de fœnis*, not *de gramine*; and *Lyndwood* upon the place, at the ſame time that he ſays, the word *fœnum* may be extended to graſs (to make graſs, that is ſo carried away for the preſent ſuſtenance of cattle, a thing tithable, within that conſtitution) makes *herbam ſiccatam* to be the ordinary conſtruction of the word *fœnum*. And if we ſuppoſe the ſetting out in graſs to be the Common law of tithing, it is wonderful that we ſhould meet with no remains of that way, in our ſtatutes, or conſtitutions, or even in common ſpeech, but that the current language ſhould have always been, what it ſtill continues, *decimæ de fœnis*, tithe of hay, or tithe out of hay. *Gibſ. Cod.* 680, 681. 1 *Rol. Abr.* 644. *Hetl.* 147. See *Cattle*.

However, in ſeveral caſes, where this point of tithe-hay, and of aftermaths, hath come in queſtion, it hath been held, that the owner is not bound to make it into hay unleſs the cuſtom of the place oblige him to it: But that, of common right, and cuſtom apart, it is ſufficient if it be ſet into graſs cocks, and (ſo tithed) be left wholly to the care of the parſon; and that therefore the owner's making it into hay, may be a good foundation of diſcharge. And in the caſe of *Hide* and *Ellis*, the court went further, and declared, that if the cuſtom was to meaſure out the tenth acre of graſs for tithe, it would be a good cuſtom, and the parſon ſhould mow it, *&c.* at his own charge. *Gibſ. Cod.* 681. 2 *P. Will.* 523. *Hob.* 250. See *Aftermath*.

But where the pariſhioner is not obliged by cuſtom to make the tithe into hay, the parſon, of common right, and without alledging a cuſtom, may make his graſs into hay upon the land on which it grew, and may for that end paſs over the pariſhioners ground, by the common path. *Gibſ. Cod.* 681. 1 *Rol. Abr.* 643.

Bill brought by a lay impropriator for tithe hay in the pariſh of *Framfield* in the county of *Suſſex*, and derives title under a grant 3 *Jac.* 1. which expreſly grants the tithes of hay. To this bill the vicar was made a party, and the plaintiff had no proof that he, or thoſe under whom he claimed, ever had received tithe hay: the defendants (pariſhioners) inſiſted he was only intitled to corn and grain, and that the vicar was intitled to tithe hay; though there was no evidence that tithe hay had ever been paid, either to the impropriator or the vicar, but the farms of defendants were under ancient *Modus's* or cuſtomary payments; and the defendants inſiſted that the hay was covered under the *Modus's*, and to corroborate this, gave ſeveral inſtances of payments of *Modus's* to the vicar by ſeveral pariſhioners, who had nothing but meadow ground, and conſequently could pay only for the tithe of hay. This cauſe was this day heard, and though there was no proof of payment of tithe hay in kind to the vicar, but only preſumed to be ſo by the *Modus's*; yet ſince there was no inſtance of the impropriator's having received tithes of hay for one hundred and twenty years ſince the grant of *Jac.* 1. the bill was diſmiſſed *per totam Curiam*. *Bunb.* 262, 263.

The finding ſtraw for the body of the church, is no diſcharge from tithe-hay, becauſe it is no advantage to the parſon, who is not charged with the repairs of the church; as was declared in the caſe of *Scory* and *Baker*. But what is further ſaid in that caſe, ſeems ſomewhat ſtrange, (*viz.* that if he had alledged that the parſon had a ſeat in the body of the church, the preſcription would have been good;) ſince the conſideration, upon which the parſon is diſcharged from contributing to the repairs of the church, is his repairing of the chancel; without regard to his place of ſitting, either in church or chancel. *Gibſ. Cod.* 681.

But

But a meadow in the pariſh, which had been ſeiſed time out of mind by the parſon and his predeceſſors, was adjudged a good conſideration for the pariſhioners to be diſcharged of tithe-hay; for it ſhall be intended, that it was originally given on that account. *Gibſ. Cod.* 681. 1 *Rol. Abr.* 649.

Of hay mown to feed deer, tithes are due of common right; and ſhall be paid; unleſs there be a cuſtom to the contrary. *Gibſ. Cod.* 681. 2 *Keb.* 25.

In the caſe of *Selby* v. *Clarke*, a cuſtom was ſuggeſted within the pariſh, that if any pariſhioner fed his ſheep with his graſs until *June* and *Auguſt*, he might mow the coarſe graſs with which they feed their ſheep in the winter, whereby the parſon had *uberiores decimas* of the ſheep. Againſt which it was alleged, that it was plainly *a non decimando*; and the court held it to be a void cuſtom. *Gibſ. Cod.* 681. 1 *Ld. Raym.* 677.

Ann. 39 *Eliz.* it was judged a good diſcharge from the tithe of hay upon the head-land, that the owner reaped, bound, and ſhocked the corn; on ſuppoſition, that the tenth ridge is the thing due for the tithe, and that the labour of the owner about the corn (to which he was not bound) was a good foundation of ſuch diſcharge. *Gibſ. Cod.* 681. 2 *Leon. p.* 70. Head-land.

And 10 *Car.* 1. a cuſtom for head-lands, ſown with corn to be diſcharged of tithes, becauſe fed with plough-cattle, or mowed and cut for that purpoſe, was adjudged a good cuſtom. *Gibſ. Cod.* 681.

Bill by the rector of *Radnage* in the county of *Buckingham* for the tithe of head-lands, *&c.* The defendant inſiſts the head-lands were only large enough to turn the plough upon, and as to this the bill was diſmiſſed. *Mich.* 1724. *Bunb.* 184.

Ann.

Ann. 22 *Car.* 2. Where it was alledged, that heath and fern were not tithable, prohibition was granted, but whether upon that part of the ſuggeſtion, appears not. And, long before, *viz.* 28, 29 *Eliz.* the opinion of *Suit* juſtice was, that if they have paid tithe-wool, milk, calves, *&c.* for their cattle, which have gone upon the land, they ſhould not pay tithe of heath, turf and broom. *Gibſ. Cod.* 681. 3 *Keb.* 685. *Godb.* 44.

Of hay growing upon land that was heath ground, it was ſaid by *Richardſon*, 5 *Car.* 1. that if it be mere waſte-ground, and yield nothing, it is excuſed by the ſtatute, for ſeven years; but if ſheep were kept upon it, or if it yielded any profit, which yielded tithe, then tithe ought to be paid. *Gibſ.* 681. *Hetl.* 145. See *ſ.* 17, 18, 19.

Hedge poles. In *Lane*'s caſe, 14 *Jac.* 1. Where the ſuit was in court-chriſtian for tithe of wood under twenty years, the defendant alledged, that he had imployed the wood in hedge-poles for meliorating his coppices, and that he had not been uſed to pay tithe of hedge-poles, and prohibition was awarded. *Gibſ. Cod.* 681. *Mo.* 917.

Hemp. The tithe of hemp and flax is now aſcertained at five ſhillings *per* acre, by ſtat. 11 & 12 *W.* 3. *c.* 16. which enacts as followeth: "Whereas the ſowing of hemp and flax is and would be exceeding beneficial to *England*, by reaſon of the multitude of people that are and would be imployed in the manufacturing of thoſe two materials, and therefore do juſtly deſerve great incouragement; and whereas the manner of tithing hemp and flax is exceeding difficult, creating thereby chargeable and vexatious ſuits and animoſities, between parſons, vicars, impropriators and their pariſhioners; for remedying whereof, it is enacted, That every perſon who ſhall ſow any hemp or flax, ſhall pay to the parſon, vicar, or impropriator yearly, the ſum of five ſhillings, and no more, for each acre of

of hemp and flax ſo ſown, before the ſame be carried off the ground, and ſo proportionably for more or leſs ground ſo ſown; for the recovery of which ſum or ſums, the parſon, vicar or impropriator ſhall have the common and uſual remedy allowed of by the laws of this land."

Sect. 2. "Provided, that this ſhall not extend to charge any lands diſcharged by any *Modus decimandi*, ancient compoſition, or otherwiſe diſcharged of tithes by law."

See *Agiſtment*, *Furze*.

Herbage.

Tithe of holly ſhall be paid, though above twenty years growth; but when it was ſuggeſted, that by reaſon of ſcarcity of timber in a particular county, they uſed it as timber to build and repair their ploughs, there prohibition was awarded. *Gibſ. Cod.* 681. 2 *Cro.* 199. *Noy* 30.

Holly.

A conſultation is provided in the Regiſter, *de decima mellis & ceræ provenientium de apibus & alveis apium:* and in the caſe of *Barefoot* and *Norton*, 11 *Car.* 1. it was reſolved, that tithe of honey and wax ought to be paid in kind *de jure*; and it is accounted a predial tithe. *Gibſ. Cod.* 681. *Reg.* 48. 3 *Cro.* 529. *Jones* (*W.*) 447.

Honey.

Concerning hops, four things have been under conſideration.

Hops.

1. *What kind of tithe they are?* And as to that, there was a caſe 3 *Jac.* 1. between *Portman*, a knight, and another, in which the queſtion was for hops in *Kent*; and adjudged, that they were great tithes; but as for hops in orchards or gardens, theſe were reſolved to belong to the vicar, as *minutæ decimæ*. *Gibſ.* 681. *Hutt.* 78.

Hops pay a predial tithe, and regularly are accounted among ſmall tithes. *God.* 414.

Thus in the caſe of *Franklyn* and the maſter and brethren of *St. Croſs*, *T.* 1721; the vicar being indowed of ſmall tithes, it was decreed, that he

was

was thereby intitled to hops, being a ſmall tithe, though of growth ſince the indowment. *Bunb.* 79.

2. Whether a *Modus* may be pleaded, to be diſcharged of tithe of hops? And in the caſe of *Crouch* and *Riſden*, 21 & 22 *Car.* 2. where the ſuggeſtion was, that they had paid ſo much an acre for tithe-hops, time out of mind; the court denied a prohibition, becauſe hops in *England* (whether brought in during the reign of *Hen.* 8. or of Queen *Elizabeth*,) were much later than the time of memory; and therefore no preſcription could be pleaded: but it was ſaid, in the ſame caſe, that if the ſuggeſtion had been, that ſo much had been paid in lieu of all ſmall tithes, prohibition would have gone, becauſe hops, woad and ſuch little things of novel invention, are ſmall tithes (which, by the way, doth not contradict the firſt poſition, becauſe, when the court called them little things, it is plain they intended ſuch hops only as grow in ſmall quantities, in orchards or gardens.) Not unlike the caſe of *Alfrey* and *Mill*, (4 *Car.* 1.) where the ſurmiſe for a prohibition was, that the hops grew in a garden, and that the cuſtom was for every garden to pay 1 *d.* &c. and that the *Modus* was held to be good, if they did not grow in any new addition to the garden. *Gibſ.* 682. There can be no *Modus* for tithe hops, becauſe the court will take notice, that hops have not been ancient, but uſed in beer of late times only, being firſt introduced into *England* about the year 1524. yet a preſcription to pay ſo much in lieu of all ſmall tithes, may include hops and other ſuch ſmall things which have come in uſe of late years. *Watſ.* *c.* 49. *Bunb.* 20.

3. *In what manner tithes of hops is to be ſet out.* Of which, it was ſaid by *Twiſden*, (a *Kentiſh* man) in the forecited caſe of *Crouch* and *Riſden*, that to that day it was a queſtion how hops ought to be tithed, whether by the hill, or by the pole, or by the

the buſhel; but, in the caſe of *Ledgar* and *Langly*, what he ſaid upon the ſame head, is thus expreſſed, Whether, by the tenth pole, or by meaſure; but *Keeling* ſaid they were payable by the pole. *Gibſ. Cod.* 682. *Sid.* 443. 2 *Keb.* 36.

Tithes of hops are not to be paid till after they are picked, and before they are dried; every tenth meaſure. *Bunb.* 20.

In a late caſe, Mr. *Chandler*, painter at *Maidſtone* in *Kent*, having ſet forth the tithe of his hops by the tenth pole unpicked, Mr. *Bliſs*, the impropriator, brought this matter before the court of *Exchequer*; where, after long debate of counſel on both ſides, and reading three former decrees, the court again declared this method of ſetting forth to be illegal. 2 *B. E. L.* 419.

And, finally, in the caſe of *Walton* and *Tyers*, *May* 17, 1753. Mr. *Tyers* having planted a conſiderable number of acres with hops, in the pariſhes of *Mickleham* and *Darking* in *Surrey*, of both which pariſhes, Mr. *Walton* was incumbent, offered to pay to him after the rate of 20*s.* an acre for the tithe thereof; which Mr. *Walton* refuſed. Whereupon Mr. *Tyers* gave him notice, that on ſuch a day he would begin to gather his hops, and would regularly ſet out every tenth hill through all his hop plantations as the tithe thereof, by ſevering the bind of the hops from the ſoil, and leaving the ſame on the poles; and that he would in the ſame manner daily ſet out the tithe of his hops, in order that Mr. *Walton*'s agent might be preſent at the reſpective times of ſetting out the tithe, and might carry away the ſame in due time. Mr. *Walton* ſaid, that this method of tithing was new and contrary to law, and that he would not take the tithe in that manner; but that he expected the whole crop ſhould be gathered, and afterwards meaſured in baſkets, and that every tenth baſket of hops, after being ſo meaſured, ſhould

be

be ſet out for the tithe thereof. This Mr. *Tyers* refuſed to do, and proceeded according to his notice to ſet out the tithe in the manner above mentioned; leaving every tenth hill ungathered, having cut or ſevered from the ſoil the binds or ſtems on which the hops on every ſuch tenth hill grew; and renewed his notice daily whilſt his hop gathering continued. Mr. *Walton* did not meddle with the tithe ſo ſet out; and after the hops had continued for ſome months upon the poles on every tenth hill as aforeſaid ungathered, and ſo became ſpoiled and rotted, Mr. *Tyers* brought an action for damages againſt Mr. *Walton*, for as much as he was thereby hindred from dreſſing and cultivating his hop plantations. Upon this, Mr. *Walton* filed his bill in the *Exchequer* againſt Mr. *Tyers*, thereby inſiſting, that the manner in which Mr. *Tyers* had ſet out the tithe of his hops, by leaving the hops on every tenth hill, and ſevering the binds from the ſoil, was not a proper method for ſetting out ſuch tithes; but that the tithe of hops ought by law to be ſet out after the ſame are picked from the bind or ſtem. And, on hearing, the court declared, that the method of tithing hops inſiſted on by the defendant in his anſwer, is not a good ſetting out of tithe of hops; but that hops ought to be picked and gathered from the binds, before they are tithable. Mr. *Tyers* appealed to the houſe of lords; ſetting forth, that the manner of ſetting out the tithes by the admeaſurement of the hops in baſkets, would be very prejudicial and inconvenient to both parties, as the hops by that means would be neceſſarily bruiſed, the flower and condition thereof hurt, and the hops thereby very much damaged; that it hath been uſual, of late years, for hop planters to direct their gatherers to pick or aſſort their hops into different pokes, according to their different degrees of fineneſs and colour, to wit, the *fine*, and the *brown*; and ſuch aſſortment,

aſſortment is the moſt material and expenſive part of the manufacturing of hops, thrice as much time and expence being required in picking and aſſorting hops into two different parcels, as is neceſſary in picking them into one poke when firſt gathered; and that it is unreaſonable, that perſons claiming tithes ſhould have the benefit of this part of the manufacture of hops, which coſts about 5*l.* an acre, without making any allowance, or contributing any ſhare to the expence; and praying relief, for theſe (amongſt other reaſons:) Firſt, there is no poſitive law, to regulate the manner of tithing hops; neither is it fixed by immemorial uſage or cuſtom; the determination of courts relating thereto have been various; and therefore that manner of tithing ſeems moſt juſt and equitable, which is both the leaſt prejudicial to the owner, and moſt beneficial to the parſon or impropriator. Secondly, the manner inſiſted on by the reſpondent, by picking and then ſetting out the tithes by admeaſurement in baſkets, is ſo very detrimental to the planter, that it muſt inevitably be the ruin of the plantation of hops, the cultivation whereof is of extenſive benefit to this kingdom: the method inſiſted on by the appellant is undeniably fair and equitable, not liable to any fraud whatſoever; whereas the method inſiſted on by the reſpondent is avowedly oppreſſive and injurious, in no wiſe productive of any benefit, or preventive of any fraud.—Mr. *Walton*, the reſpondent, hoped the decree would be affirmed, (amongſt other reaſons) for theſe following; Firſt, the ſetting out the tithe of hops by meaſure, after they are picked from the bind or ſtem, is the faireſt and moſt equal method, and liable to the leaſt inconvenience; whereas the method of tithing contended for by the appellant, by every tenth hill, would be liable to great fraud, inaſmuch as the planter of hops would have a right to ſet out for tithe

tithe every tenth hill, to be computed from the place he began at; and he might any year determine before he manured his hop-ground, where he would begin to ſet out the tithe, and thereby would certainly know every tenth hill through the whole plantation; and might neglect to manure or improve them ſo much as the other hills, which would be unjuſt and unreaſonable. Secondly, the method of tithing contended for by the appellant, would give occaſion to many diſputes and controverſies; as the hops growing on one hill are apt naturally to intermix with the hops growing on the hills adjoining, ſo that it is ſcarce poſſible to ſever the one from the other intire; and the owner of tithes, or his agents, or ſervants, exerciſing the right of entering into the hop-grounds, and pulling up the planter's poles, muſt frequently furniſh matter for ſuits and vexations; which would be inconvenient both to the owner of the tithes, and the pariſhioners. Thirdly, the appellant hath not made the leaſt proof, that the tithe of hops was ever ſet out before they were picked from the bind or ſtem, or that they were tithed by the tenth hill, (which is the method of tithing he contends for;) but on the contrary, in many inſtances, where the method of ſetting out the tithe-hops has been diſputed or brought in queſtion, it has been uniformly determined and adjudged, after ſolemn argument, that the tithe of hops by law ought to be ſet out by meaſure, after they are picked from the bind or ſtem.—And the decree was affirmed by the lords. 2 *B. E. L.* 419.

4. *At what time, the tithe of hops is to be ſet out.* Upon which head, *Rolle* ſays, that in the caſe of *Barham* and *Gooſe*, 14 *Jac.* 1. it was affirmed by *Serjeant Hitcham*, and agreed to by *Mountacute*, that one may ſet out the tenth part of hops for tithe, *before* they are dried. *Gibſ.* 682. 1 *Rol. Abr.* 644.

Mr.

Mr. *Stephens* moved for a prohibition to be directed to the conſiſtory court of the biſhop of *Worceſter*, to ſtay proceedings in a ſuit there for tithes of hops, upon ſuggeſtion of a *Modus* time whereof, *&c.* there uſed, that if the parſon ſend a ſervant, *&c.* to pull *aliquam partem lupularum*, he ſhall have the tithes of them, *&c.* upon which a rule was made, to ſhew cauſe why a prohibition ſhould not be granted. And now Mr. *Banniſter* ſhewed for cauſe againſt the prohibition. 1. The cuſtom is void for uncertainty, for it does not appear, how much hops ought to be pulled, *&c.* 2. That it is an ill cuſtom, becauſe it is no benefit at all to the parſon, but drives him to more pains than the law requires, to intitle him to that, which by law he ought to have in the ſame manner without ſuch pains. Of which opinion was the whole court. And therefore the rule was diſcharged. Lord *Raym.* 504, 505.

For a ſaddle horſe, that is kept for pleaſure, tithe of agiſtment ſhall not be paid, becauſe by it no profit comes in; but (as the caſe of *Potbill* and *May* is reported by *Bulſtrode*) it ſhall be paid for working-horſes for the cart or plough: though that is contrary to the eſtabliſhed rules of law in this caſe, which are recited under the title *Agiſtment*; and alſo contrary to the caſe of *Bill* and *Tarde*, 15 *Jac.* 1. and is not to be reconciled, but by confining the agiſtment of labouring horſes, to labour about ſuch things, as are profitable to the owner, and of no profit to the parſon. 1 *Bulſtr.* 171. *Poph.* 126. 1 *Rol. Abr.* 646. *Gibſ.* 682. Horſes.

But if horſes are kept for ſale, and are ſold, or if they be the horſes of travellers, or others, taken in as gueſt-horſes, in theſe caſes, it is agreed by all, that tithe of agiſtment is due; becauſe a profit ariſes from them. *Gibſ.* 682. 1 *Rol. Abr.* 647. 1 *Bulſt.* 171. *Hard.* 95. *Poph.* 142.

Saddle-horſes ſhall pay no tithes, no more than cattle for the plough and pail, or cattle killed for the uſe of a man's own family, in reſpect of the profit that otherwiſe accrues to the parſon from theſe. *Bunb.* 3.

Houſes. *De jure Communi*, no tithe ought to be paid of houſes of habitation, becauſe they do not grow and renew by the year; but, though no tithe is payable *de jure*, yet if, time out of mind, a *Modus decimandi* hath been paid for houſes, it may be recovered in the eccleſiaſtical court, in the nature of tithe, and the law will ſuppoſe that it was, originally, in lieu of the tithes of the land upon which the houſes are built; and, becauſe it might have a lawful beginning, and hath been time out of mind, it ſhall continue. *Gibſ. Cod.* 682. 11 *Rep.* 16. *a. Hob.* 10.

For the law of tithe for houſes in *London*, ſee the laſt chapter.

Lambs. This is a *ſmall* tithe, as was agreed 15 *Jac.* 1. and before that, *viz.* 39 & 40 *Eliz.* (as *Noy* alledged in the caſe of *Ward* and *Britten*) a vicarage appearing to be endowed of ſmall tithes, it was reſolved in the Exchequer, upon conference with civilians, that lambs were included as ſmall tithes. But in the foreſaid place, *Bridgman* cites a reſolution in the caſe of *Sharman* and *Beadles* (40 & 41 *Eliz.*) that an action of debt lies upon the ſtat. 2 *Ed.* 6. for tithe lambs; from which he infers, that they muſt be a great tithe, and alſo a predial tithe; ſince none but ſuch are included in that part of the ſtatute: But I think generally, they are reckoned a mixt *ſmall* tithe. *Gibſ.* 682. *Popb.* 144. *Palm.* 219.

As to the manner of tithing lambs, where the number is under ten, it is the ſame with the manner of tithing calves in the like caſe: (which ſee under that title); and if the parſon inſiſts upon it, that he will wait till next year, that they may come up

up to the tithable number; or if the lambs belonging to the ſeveral owners are put together, to be tithed jointly; in both caſes prohibition will lie: In the firſt caſe, becauſe it is againſt the nature of tithe by the Common law, which is annual; and in the ſecond, becauſe it is a cuſtom againſt reaſon; for by that means it may fall out, that ſome one may have but one lamb, and that be taken for tithe; and he that had more, ſhould pay nothing at all. *Gibſ.* 682. 3 *Cro.* 403. *Hob.* 329.

The firſt of thoſe determinations is contrary to *Lyndwood: Ubi non ſunt plenè decem agni, ſic videlicet, ut nec ſeptimo agno recepto pro decimâ, ſi tot ſint, nec pecunia recepta loco decimæ, ubi pauciores ſunt quam ſeptem, expectet uſque ad proximum annum. Lyndw. de dec. c. Quoniam, &c.*

In the caſe of *Selby* verſus *Clerk*, it was delivered by *Holt*, Chief Juſtice, that the tenth lamb is due to the parſon by common right; and though they make diſtribution in the eccleſiaſtical courts, that is only among the parſons themſelves, with relation to the places of their feeding throughout the year, but does not concern the proprietor of the land, who ought to pay the tenth lamb to the parſon by Common law. But this, when paid, could be no foundation of a claim, by way of *Modus*, to be diſcharged of all tithes of the lambs there fed; on which the pretence for a *Modus* was founded. L. *Ray.* 677.

It hath alſo been held, that if a man preſcribe to pay one half-penny for every lamb, that he ſhall ſell before the firſt day of *May*; and to deceive the parſon, ſhall ſell all his lambs the day before *May-day*; this is fraudulent, and the cuſtom ſhall be no diſcharge. *Gibſ. Cod.* 682. 1 *Rol. Abr.* 652.

In the caſe of *Boys* and *Ellis*, *M.* 1723. in a bill for tithes, a queſtion aroſe, whether there was fraud in tithing lambs, on this caſe. The ewes were kept by the defendant in the pariſh of *Driffield*

in the county of *York* (where the demand lay) all the year until *Chriſtmaſs*, when they were ready to drop their lambs; and then were removed into the pariſh of *Skern*, (where there was a ſmall *Modus* only for lambs) and there kept till *Lady-day*, for convenience of forage; (as inſiſted upon by the defendant) and at *Lady-day* were brought back to *Driffield: Note*, the land in *Skern* was the defendant's own land. By the court; Here is not a ſufficient proof of fraud: And the plaintiff's bill was diſmiſſed. But *Page* and *Gilbert*, barons, thought at firſt, it might be proper to ſend it to an iſſue, to try whether fraud or not fraud, and whether this had been the uſual method of the defendant's courſe of huſbandry; but afterwards they concurred with baron *Price*. *Bunb.* 139. See *Wool*, *Sheep*.

Bill for tithe (*inter al'*) of *Lamb*; the defendant inſiſts that it was cuſtomary to tithe their lambs at St. *Mark*'s day (25th of *April*): But for the plaintiff it was ſaid, that by the defendant's own proof it appears, they generally then are but three weeks old, and cannot live without the dam; but it is uſual to tithe them not until *Auguſt*, and ſometimes not until *Michaelmas*; but the general rule is to tithe them when they are capable of living without the dam. And *per curiam*; The cuſtom inſiſted upon by the defendant is unreaſonable; and decreed for the plaintiff. *Trin.* 1723. *Bunb.* 133.

Lattermath. See *Aftermath*.

Lead. This is one of the things which my lord *Coke* exempts from tithe, as of the *ſubſtance of the earth*, and not annual; and therefore where tithe is claimed, it muſt be upon the foot of cuſtom. 2 *Inſt.* 651. *Gibſ.* 682.

Lime. This alſo is one of the things exempted from tithe, on the ſame account as lead; and therefore it was reſolved, 13 *Jac.* 1. in the caſe of *Thomas* and

and *Perry*, that if tithe be demanded of a lime-kiln, it can only be by cuſtom. 1 *Rol. Abr.* 642. 2 *Keb.* 596.

See *Flax.* Lime.

It is agreed by all, that timber-trees of the age of twenty years or above, ſhall not pay tithe of loppings: (No not if they be cut every ten or twelve years); but it hath been made a queſtion, whether ſuch branches, if the trees are lopped before twenty years, ſhall not always pay for loppings after twenty years; inaſmuch as at the firſt lopping, the tree was not privileged. Upon which head, we find two contrary reſolutions; one reported by *Brownlow*, in theſe words, "If a man top a tree "under the growth of twenty-one years, and ſuf- "fer the body to grow; and afterwards, when the "boughs are grown out again, he doth lop and "top it again, he ſhall pay no tithes, although the "tree was not privileged at the firſt cutting." The other reſolution is in the caſe of *Brook* and *Rogers*, 2 *Jac.* 1. reported by *Moor*, in theſe words: "And it was held that if a tree be lopped "before twenty years, and after twenty years, be "lopped every ten or ſeven years, tithe ſhall be "paid of ſuch loppings;" where reference ſeems to be made to ſome like former reſolutions in the reign of queen *Elizabeth*. *Gibſ.* 682, 683. 2 *Cro.* 101. *Mo.* 762, 908. See *Dotards.* Loppings.

Stat. 31 *Geo.* 2. *cap.* 12. *ſect.* 1. Every perſon who ſhall plant, raiſe or cultivate, any madder in any pariſh or place within *England*, ſhall pay to every parſon, vicar, curate or impropriator of ſuch pariſh, *&c.* 5*s.* and no more yearly, for each acre of madder ſo planted, and proportionably for more or leſs ground ſo planted in lieu of all tithe of madder; for the recovery of which ſums the parſon *&c.* ſhall have the uſual remedy. Madder.

Sect. 2. No madder ſhall be carried off the ground on which it grows, before the money directed to be taken in lieu of tithes be paid to the perſon intitled.

Sect. 3. This act ſhall not exend to charge any lands diſcharged by any *Modus decimandi*, ancient compoſition, or other diſcharge of tithes by law.

Sect. 4. This act ſhall be in force for fourteen years, and from thence to the end of the then next ſeſſion of parliament.

Stat. 5 *Geo.* 3. *c.* 18. Whereas an act made in the thirty-firſt year of his late majeſty king *George* the *Second*, intituled, An act to encourage the growth and cultivation of madder in that part of *Great Britain* called *England*, by aſcertaining the tithe thereof, was to continue in force from the firſt day of *Auguſt* one thouſand ſeven hundred and fifty-eight, for the ſpace of fourteen years, and from thence to the end of the then next ſeſſion of parliament: And whereas the cultivation of madder, from the ſetting to its being fit for uſe, requires ſo long a time, and the buildings, mills, and other requiſites neceſſary to be provided and maintained for manufacturing it, are ſo expenſive, that many people may be unwilling to begin the culture of it during the ſubſiſting term of the ſaid act: And whereas the price of foreign madder is of late greatly raiſed, and the ſame does not come into the conſumers hands ſo good as it may be manufactured here; Be it therefore enacted, *&c.* that the ſaid act ſhall be, and the ſame is hereby declared to be, further continued from the Expiration thereof, for and during the further term of fourteen years, and to the end of the then next ſeſſion of parliament.

Maple. Tithe of maple ſhall be paid, although it be of twenty years growth, and more. *Gibſ.* 683. 2 *Cro.* 199.

Maſt. It is ſaid by Sir *Simon Degge* (upon what authority he doth not add) that tithe of crabs, maſt, *&c.* is to be paid, when the ſame are gathered; or ſatisfaction is to be given if eaten with ſwine on the ground. *Gibſ.* 683.

Milk. In the *Regiſter* there is a conſultation for tithe *de decimâ lacticiniorum*, (which yield a mixed tithe;) and

and it hath been obſerved before, under the title, cheeſe, that when tithe is paid of cheeſe, it ſhall not be paid of milk, and *vice verſâ*. A certain number of cheeſes, and the tithe of cheeſe from *May* the firſt to *Auguſt* the firſt, (pleaded as cuſtom) have both been adjudged good diſcharges from the payment of tithe milk; for they come of labour, and are not due of themſelves, and therefore are a good diſcharge. But cuſtom of having all the milk ſo many mornings and evenings, from the 9th of *May* till a young lamb yeaned, ſhould be heard to bleat, in lieu of all tithe of milk, was adjudged ill; not only becauſe it is a payment of part of the very thing, which can never be a good *Modus*, but alſo becauſe of the uncertainty: For it may be that a lamb is heard to bleat before the 9th of *May*, and then the parſon ſhall have no tithe at all. *Gibſ.* 683.

In the caſe of *Foy* and *Liſter*, the point was, upon a *Modus*, to pay from *April* to *November* the tenth day's milk once ſkimmed, made into cheeſe, in lieu of all tithe of milk: and the reaſoning upon it, was, becauſe of the labour of the pariſhioner, which goes to making the milk into cheeſe; but no determination by the court. L. *Raym.* 1171. *Gibſ.* 683.

As to the circumſtances in the payment of tithe-milk, three things are inquirable; 1. To whom? and that is, to the parſon in whoſe pariſh the cows yielding milk, depaſture for the time. 2. In what manner? And that ſhall be, not by the tenth part of every meal, but by every tenth meal intire. 3. At what place? and that was adjudged to be the church-porch, whither it ſhall be brought by the pariſhioner, as the Chief Baron, and two others held; but *Raymond* thought it ſhould be delivered at the houſe of the parſon or vicar. Declared *per curiam*, That of common right tithe milk is payable at the parſonage or vicarage houſe. *Gibſ.* 683. *Raym.* (Sir *Tho.*) 277. L. *Raym.* 129.

The ſame rules that take place as to the milk of cows, do, by parity of reaſon, and according to the laws of the church, hold in the milk of goats and ewes, where it is preſerved: But *Rolle* ſays, that in the caſe of *Sewel* and *Bicknar*, 14 *Car.* 1. upon ſurmiſe, that it was not the cuſtom of ſuch a county to pay tithe of milk of ewes, prohibition was granted. *Gibſ.* 683. 1 *Rol. Abr.* 654.

In the caſe of *Scoles* verſus *Lowther*, where it was pleaded, that cattle for the pail for the uſe of the houſe, ought not to pay tithes, a prohibition to the ſpiritual court was granted, *niſi*, *&c.* But it appearing afterwards, that the plaintiff carried the milk of theſe cattle to his houſe in another pariſh, and uſed it there, it was reſolved by the whole court, that the defendant ſhould have tithe of the milk. L. *Raym.* 129.

In the caſe of *Dodſon* and *Oliver*, *E.* 1721, it was decreed, that if there be any cuſtom in a pariſh for the manner of tithing milk, as to carry it to the church-porch, or parſonage houſe, that muſt be obſerved by the pariſhioner; but if there be no particular cuſtom or uſage, the pariſhioner is obliged *de jure* to pay every tenth meal, to milk the cows at the uſual place of milking into his own pails; and the parſon is obliged to fetch it away from the milking place, in his own pails, in a reaſonable time; and if he doth not fetch it before the next milking time, the pariſhioner may juſtify pouring the milk upon the ground, becauſe he hath occaſion for his own pails. And it was determined by the whole court of Exchequer in this caſe, that the milk ought not to be carried either to the church-porch, or to the parſon's houſe, and that it ought to be fetched by the parſon. *Bunb.* 73.

So in the caſe of *Carthew* and *Edwards*, *T.* 1749; *Edward Carthew*, clerk, rector of St. *Muvan* in *Cornwal*, brought his bill in the Exchequer, (amongſt other particulars) for the tithe of milk.

The

The defendant, *Edwards*, in his anſwer ſet forth, that the plaintiff having declared he would not ſend for or fetch the tithe milk, he did order every tenth meal of his cows to be turned upon the ground; it not being uſual or cuſtomary for the pariſhioners of the ſaid pariſh, to carry their tithe milk home to the rector. The court, upon hearing the cauſe, and ordering two decrees in the ſaid court to be read, wherein *Dodſon* was plaintiff, and *Oliver* defendant, did declare, that the defendant ought to have milked the tenth meal of his cows, in veſſels of his own, at the place and in the manner he milked the other nine meals, and that the plaintiff ought to have fetched it away in his own veſſels. 2 *B. E. L.* 433.

A cuſtom that every inhabitant in the pariſh, who kept cows there, had uſed time out of mind, to ſet out the whole meal of milk upon the ninth day of *May* at night, and upon the tenth day of *May* in the morning, and ſo upon every ninth day then next following, until one lamb (to be yeaned in the year following) ſhould be heard to bleat there, hath been adjudged an unreaſonable cuſtom; becauſe in ſuch caſe it might be contrived that lambs ſhall come ſo ſoon, as to deprive the parſon of the tithe milk for a great part of the year. L. *Raym.* 358.

Mich. 1731. *Brinklow* and *Edmonds*, a bill was exhibited to eſtabliſh ſeveral *Modus's* in the pariſh of *Newton Longville* in the county of *Buckingham:* One of which was, that tithe milk ought to be paid by every tenth evening and morning's meal in kind; from *Hoe Monday* to the ſecond day of *November*, to commence upon the evening of *Hoe Monday* (that is, the *Monday* fortnight after *Eaſter-day*,) and the morning following, to be taken by the rector at the place of milking, and no tithe milk to be paid for the reſidue of the year. But by the court; This

is

mills ſince erected may be to us ancient, and their firſt erection not known, the rule of their diſcharge ſeemeth to be, that all ſuch mills whoſe firſt erection was before time of memory, and is not otherwiſe known by matter of record, and have not been ſubject to the payment of tithes, ſhall be intended to be erected before the ſtatute, and ſo to be tithe free. But as to mills for which tithes have been paid, and new mills, tithes muſt be paid for them. *Bob.* 133.

Therefore when prohibitions are moved for to ſtay ſuits for tithes in the eccleſiaſtical courts for ancient mills, it muſt not only be ſuggeſted that the mill is an ancient mill, but alſo that it hath never paid tithes; and the courts of Common law do generally require an affidavit to be made of the truth of ſuch ſuggeſtion, to wit, that the mill is ancient, and hath not within memory paid any tithes. *Bob.* 133.

The king's prohibition ſhall not lie.] *Trin.* 15 *Ja.* A prohibition was prayed to the ſpiritual court, upon a ſuggeſtion, that the parſon libelled for tithes of a mill which was erected upon land diſcharged of tithes by the ſtatute of monaſteries 31 *H.* 8. *c.* 13. and denied by the whole court: For of a mill erected of new, a prohibition lieth not. *Cro. Ja.* 429.

If there is a *Modus* in lieu of all tithes iſſuing out of a meſſuage, and an ancient water-mill for corn, and a new water-mill for corn is erected within the ſaid meſſuage; if the ſtream on which an ancient mill ſtood is diverted by the owner (and not by the act of God), and a new mill erected upon the new ſtream; they ſhall not be diſcharged by virtue of any former *Modus.* 1 *Rol. Abr.* 641.

But if there hath been an ancient corn-mill for which a *Modus* hath been paid for time immemorial, and afterwards, by continuance of time, the mill

mill ſtream changeth its courſe, and goeth in a place a little diſtant from the ancient ſtream, and thereupon the owner of the mill pulleth it down, and rebuildeth it in the new place where the ſtream now runneth; this ſhall be diſcharged of tithes by force of the ancient *Modus*, for this cometh by the act of God, and not by the act of the party. 1 *Rol. Abr.* 641.

So, the addition of a pair of ſtones to an ancient mill, doth not deſtroy the *Modus*. Carth. 215.

But if the ſurmiſe be of a certain rate or *Modus* for all mills erected and to be erected, and a mill there appears to be new; the *Modus* cannot extend to it, by reaſon of the ſtatute aforeſaid. 3 *Bulſt.* 212.

The mines of coal, and of metals of all kinds, are free from tithe, as being of the ſubſtance of the earth, and not annual; and therefore are not chargeable, but by cuſtom. *Gibſ.* 683. Mines.

This having been aſſerted as a known law, in the caſe of *Buxton* verſus *Hutchinſon*; it is added, that the court therefore directed a trial to be had at law, whether there was any, and what cuſtom, within that townſhip, for the payment of tithe-oar. 2 *Vern. p.* 46. *Gibſ.* 683.

Concerning theſe there are two queſtions: 1. Whether they ſhall pay tithe? And though it was urged, that they are of the nature of the land, and ſo are privileged, yet the whole court was of opinion, that inaſmuch as the owner dug them up, and made profit of them, and ſold them in another pariſh, tithe ſhould be paid of them. 2. By whom the tithe ſhall be paid? Which queſtion was reſolved in the caſe of *Grant* and *Hedding*, in theſe words, If the owner ſells them, and pulls them up himſelf, he ſhall pay the tithes; but if he ſell them particularly to another, the vendee ſhall pay the Nurſeries.

the tithes. *Gibſ.* 683, 684. 3 *Cro.* 526. *Jones* (*W.*) 416. *Hard.* 380.

Oak. This together with aſh and elm, is agreed on all hands to be privileged from paying tithe, by the ſtatute of *Sylva Cædua*, as timber, being of or above the growth of twenty years: But, beſides this, it hath been reſolved, that oak under twenty years, being fit for timber in time to come, ſhall not pay tithe; and that, though it ſtands till it is rotten, and unfit, not only for timber, but for all manner of uſes, except the fire, it ſhall be privileged, becauſe it had been once privileged.

Offerings. Bill by the vicar of *Brackworth* in the county of *Glouceſter* for tithes; It was decreed *per totam curiam*, That *Eaſter* offerings were due of common right at two-pence *per* head, unleſs it had been cuſtomary to pay more; but the vicar ought to have a decree accordingly, though there was no proof of *Eaſter* offerings ever having been paid, (there being a lay impropriator, who is not intitled to offerings, but he only who exerciſes the ſpiritual function.) And it was ſaid by baron *Gilbert*, that offerings were a compenſation for perſonal tithes. *Trin.* 1724. *Bunb.* 173, 174.

Orchards. Of theſe, my lord *Coke* ſaith, if the ſoil of an orchard be ſown with any kind of grain, the parſon ſhall have tithe of the fruit trees, and of the grain, for they be of ſeveral and diſtinct kinds. See *Garden*, *Fruit*.

Oſiers. Theſe being employed in hurdles for ſheep, no tithe ſhall be paid of them. 2 *Keb.* 635.

Park. The general queſtion upon this head hath been, where a park hath paid a *Modus*, and is diſparked, whether the *Modus* ſhall continue, or be diſcharged, and tithe paid in kind? And all the books are clear, that if the *Modus* was a certain conſideration in money for all the tithes of ſuch a park, ſuch *Modus* ſhall hold, notwithſtanding it be diſparked. But if the *Modus* was for the deer and herbage of ſuch a

park, the *Modus* is gone, upon diſparking. *Gibſ.* 684. *Mo.* 909. 3 *Cro.* 467. 2 *Bulſt.* 240.

In like manner, if the *Modus* had been to pay a buck and a doe for all tithes of ſuch a park, and the park is diſparked, the *Modus* ſhall continue, and the owner may give a buck and a doe out of another park; but if it was, to pay the ſhoulder of every deer, or expreſly a buck or a doe out of the ſame park, the *Modus* is gone. *Gibſ.* 684. *Noy* 34. *Mo.* 909.

But where the *Modus* was, part in money, and part in veniſon out of the park (*viz.* two ſhillings and the ſhoulder of every deer), the court was divided, two being of opinion that the two ſhillings continued, and that the ſpiritual court ſhould aſſign an equitable recompence for the ſhoulders, according to the number that had been uſually paid; and the other two, that the money and veniſon making one intire *Modus*, the one being gone, the whole was diſſolved: Which ſeems by *Moor*, to have been according to a judgment given before, in the reign of queen *Elizabeth*. *Gibſ.* 684. *Hob.* 39. *Godb.* 237.

Partridges. No tithe ſhall be paid of the eggs or young of partridges and pheaſants; becauſe they are *feræ Naturâ*: And though they be made tame, or be kept in a place incloſed (their wings being clipped), and there lay eggs, and hatch young ones; yet the caſe is not altered. *Gibſ.* 684. 1 *Rol. Abr.* 636.

Paſturage. See *Agiſtment*.

Peaſe. It was reſolved, 12 *Jac.* 1. that if one gather green peaſe to be eat in his houſe, no tithe ſhall be paid of them; but otherwiſe, if he gather them for ſale, or to feed his hogs. *Gibſ.* 684. 1 *Rol. Abr.* 647. See *Beans*.

Pheaſants. *Ann.* 15 *Car.* 1. Prohibition was granted, upon ſurmiſe, that the cuſtom was, that tithe ſhould not be

be paid of pheaſants. *Gibſ.* 684. *Mar.* 26. See *Partridge.*

Pigeons. *Ann.* 15 *Jac.* 1. It was reſolved, that tithe ought to be paid of pigeons, and prohibition was denied. Which ſeems to be meant of pigeons ſold, becauſe it was adjudged the year before, that of ſuch only, and not of thoſe that are ſpent in the houſe, tithe ſhould be paid, for this is the diſtinction, that hath ſince obtained; though they are ſo far from being *feræ*, that it is felony to take them out of a pigeon-houſe; and as to the reaſon given in *Rolle*, that they are for the maintenance of thoſe who labour in other things, whereof the parſon hath tithes, *that* will equally cut off the tithe of calves, lambs, pigs, *&c.* if the owner ſhall pretend that they are to be ſpent in his houſe. *Gibſ.* 684. 1 *Rol. Abr.* 644. 2 *Rol. Rep.* 2.

The ſame is declared concerning pigeons, which are in holes about a houſe, and increaſe there. *Gibſ.* 684.

Pigs. Tithe of theſe is to be paid (in the ſame manner as tithe of *calves*, which ſee); as ſoon as they are weaned, and can live without the dam. *Gibſ.* 684.

Quarries. No tithe is payable out of quarries or pits of any kind, becauſe they are parcel of the inheritance; and, beſides, (they ſay) the parſon may have tithe of the ſurface; which, by the way, affords a very poor tithe, if any: In 5 *H.* 4. a petition of the Commons was denied, about being ſued in the eccleſiaſtical courts, for tithes of ſtone and ſlate taken out of the quarries. The ſame petition was renewed 8 *H.* 4. and the king's anſwer was, that the former cuſtom ſhould continue. The like had been attempted about ſea coals, 51 *Ed.* 3. In thoſe days, it ſeems, ſuch things were tithable, at leaſt by cuſtom; and it was not thought proper to be altered. *Gibſ.* 684. 1 *Roll. Abr.* 637. *Mo.* 908. 1 *Cro.* 277. *Mar.* 58. *Still. Eccl.* 263.

Of

Of theſe, no tithe is due *de jure*; being left for the poor, (as was directed in the law of *Moſes*) and being alſo the remains of corn, for which tithe has been paid; but this is to be underſtood only of rakings, which have been *minus voluntarie diſperſæ*; and therefore if they are ſued for in the ſpiritual court, the ſuggeſtion for a prohibition muſt expreſly ſet that forth; and it is not ſufficient to ſay, that they were *lapſæ & diſſipatæ in collectione*. *Gibſ.* 684. *Littl.* 35. 1 *Cro.* 475. 1 *Rol. Abr.* 645. Rakings.

But that, heretofore, tithes were thought to be due of rakings *de jure*, (and that, by conſequence, no temptation was left to evil-minded men to defraud, by enlarging the rakings), is evident from hence, that when ſuits were brought by incumbents for them, the plea of the defendant often was, a *Modus* of ſomething done for the parſon that he was not obliged to do; which plea had been unneceſſary, if rakings in their own nature had not been tithable. *Gibſ.* 684. 1 *Cro.* 702. *Noy* 15. *Mo.* 278. *Sav.* 100.

It was reſolved, in the caſe of Dr. *Skinner*, 15 *Car.* 1. that if a man cut coppice wood, and pay tithe of it, and before any new branches ſprung out, grub up the roots and ſtubbs of the wood; he ſhould not pay tithe of them, becauſe they are *parcel of the franktenement*, and not *annually renovant*. *Gibſ.* 684. Roots.

This is a predial ſmall tithe: For where the parſon had the great tithes, and the vicar the ſmall, and a land which had been ſown with corn, was ſown with ſaffron, the tithe was adjudged to the vicar, as a ſmall tithe; notwithſtanding the ſtatute 2 *Ed.* 6. *c.* 13. that tithes ſhall be paid in ſuch manner as they have been for forty years paſt. *Gibſ.* 685. *Mo.* 909. *Ow.* 74. Saffron.

This is ſaid not to be tithable, but by cuſtom only. *Gibſ.* 685. Salt.

Sheep. Whereas ſheep produce two things tithable, viz. lamb and wool; theſe two are ſpoken of under the reſpective heads.

But as to the tithe for depaſturing of ſheep, the rule of that by the Canon law, is laid down in the provincial conſtitutions; and in the books of Common law, there are theſe two caſes: 1. Where the owner of the ſheep had depaſtured them in the pariſh from *Michaelmas* to *Lady-day*, and then ſold them; upon ſuit in the ſpiritual court for a tenth of the bargain, the owner to obtain prohibition, furniſhed that he could pay a tenth of the wool, according to the cuſtom of the pariſh: But prohibition was denied, becauſe the parſon was defrauded of all, if he had not the tenth of the bargain; inaſmuch as the ſheep were gone out of the pariſh, and he could not have any wool, becauſe it was not the time of ſheering. 2. Where ſheep were taken in to depaſture, after the corn was reaped; and the defendant, to have a prohibition, ſuggeſted, that he took them in to feed, *pro melioratione agriculturæ, infra terras arabiles, & non aliter*; the court held, that the parſon ought not to have tithe of the corn and ſheep too; for the ſheep make the ground more profitable, and to yield more; which is a fair diſtinction, if the owner took them in *gratis*; but if he had any conſideration for them, an inn-keeper might as well ſay, that he takes in gueſt-horſes, *pro melioratione agri*, and upon that, plead a diſcharge from tithe. *Gibſ.* 685. *Poph.* 197. 1 *Mod. Rep.* 216.

Bill for tithe herbage for ſheep depaſtured in the pariſh three or four months after they had been ſhorn, and then were removed into another pariſh, and ſhorn there; and cited for the plaintiff, *Coleman* and *Barker*, *Paſch.* 1726, and *Demmer* and *Wingfield*, 1 *W. & M.* (cited there). But *per curiam*, No tithe-herbage ſhall be paid for ſuch ſheep,

becauſe they are *animalia fruſtuoſa*. *Hil.* 1731. *Bunb.* 313.

Dr. *Godolphin* ſays, if ſheep ſtray out of one pariſh into another, and there yean, no tithe is payable for this to the parſon of that place; but if they go there for thirty days or more, for this a rate tithe is payable to that place; for, for ſheep removed from one pariſh to another, each parſon muſt have tithe *pro rata*: But under thirty days no rate tithe is to be paid. *God.* 438.

And by a conſtitution of archbiſhop *Winchelſea*, if ſheep do couch in one pariſh, and feed in another, the tithe ſhall be divided between the two churches: yet (ſaith *Lyndwood*) not equally, but proportionably; for the far greater part ought to be aſſigned to that church, within the pariſh whereof they fed for the time, than to that where they only couched. *Lyndw.* 198.

And further, by the ſaid conſtitution it is ordained, that if foreign ſheep ſhall be ſhorn in any pariſh, the tithe ſhall be there delivered to the rector of the church, unleſs he can be ſufficiently informed, that ſatisfaction hath been made for the tithe elſewhere, ſo as lawfully to hinder the payment thereof in ſuch pariſh where they are ſhorn. *Lynd.* 197. *God.* 438.

In like manner, if a perſon ſhall buy or ſell any ſheep, and it is certain from what pariſh the ſheep do come, the tithe thereof ſhall be proportionably divided between the two pariſhes: But if it be uncertain, that church ſhall have the whole tithe, within the limits whereof they are found at the time of ſhearing. *Lynd.* 194.—See *Lambs.*

This is reckoned among the things not tithable *de jure*, as being of the ſubſtance of the earth; of the ſurface of which tithe is payable. Slate.

Tithe being paid for the corn, no tithe ſhall be paid for the ſtubble; becauſe this is no more than Stubble.

part of the ſtalk, upon which the corn grew. *Gibſ.* 685. *Yelv.* 87.

Sylva Cædua.

See *Trees*, *Wood*.

Tares.

It was reſolved by three barons *contra Price*, that tares, whether green or ripe, are a great tithe, and belonged to the rector. *Bunb.* 279.

If tares are cut down green, and given to cattle for the plough, no tithe ſhall be paid for them. This is the rule laid down; but it is to be obſerved, that where this hath been ſo adjudged, it was upon theſe two conſiderations; either, Firſt, that they had not, in the pariſh, ſufficient paſture for the draught cattle and milk kine; as in the caſe of *Perry* and *Soam*: Or, Secondly, becauſe it was the cuſtom of the pariſh, that green tares, cut for labouring cattle, ſhould not pay; as, in the caſe of *Mead* and *Shirman*. *Gibſ.* 685. 1 *Cro.* 139. 2 *Leon.* 27. *Jones* (*W.*) 357.

A preſcription may be within a pariſh that, by reaſon they have not ſufficient meadow for milch kine and draught cattle, they have uſed to cut ſome of their tares green, and give them to the aforeſaid ſtock, and to be diſcharged of tithes for the ſame: And this is a good cuſtom and conſideration, for that the parſon hath an advantage thereby, as well as the pariſhioner; namely, in the tithe milk, and manuring of the other corn land; and the matter is, the want of meadow and paſture; and the ſurmiſe is, as if it had been ſaid, that for want of meadow and paſture, they have uſed to eat their meadows with their plough cattle, and for ſo much as they did eat to pay no tithes. *Watſ. c.* 49. *Bunb.* 279.

So if a man, according to the cuſtom of the country, doth ſow his land to feed his horſes for tillage, and the uſe hath been to ſuffer the horſes to be fed upon the land, without any mowing of the grain, the parſon ſhall not have any tithes there-

of;

of; becauſe it is no more than paſture for his horſes. *Watſ. c.* 49.

This is one of the things which my lord *Coke* mentions as not tithable; being of the ſubſtance of the earth, and not annual. 2 *Inſt.* 651. Tile.

By a conſtitution of archbiſhop *Winchelſea*, tithes ſhall be paid of trees, if they be ſold: which *Lyndwood* explains of large trees, which do bear fruit, and being cut down are not fit for timber, but are uſed for fuel. *Lynd.* 200. Trees.

And by a conſtitution of archbiſhop *Stratford:* Foraſmuch as divers perſons do refuſe to pay tithes, which are notoriouſly due, of their *Sylva Cædua*; and of the wood thereof being felled, which things do not require ſo much labour as the fruits of the ground; and think that they lawfully refuſe the ſame, becauſe they have not paid tithes thereof in times paſt; and withal to render it doubtful, what ſhall be deemed *Sylva Cædua:* We do therefore declare that *Sylva Cædua* is that, which of whatſoever kind of trees it is, is kept on purpoſe, and is mature and fit to be cut down, and which being cut down, ſprings again from the ſtump or roots; and that the tithe ought to be paid thereof, as a real and predial tithe; and that the poſſeſſors of ſuch woods ſhall by all manner of eccleſiaſtical cenſures be compelled to pay the tithe thereof, when cut down, as of hay and corn. *Lynd.* 190.

But by the ſtatute of the 45 *Ed.* 3. *c.* 3. it is enacted as followeth: "At the complaint of the "great men and the commons, ſhewing by their "petition, that whereas they ſell their great wood "of the age of twenty years, or of greater age, to "merchants to their own profit, or in aid of the "king in his wars, parſons and vicars of holy "church do implead and draw the ſaid merchants "in the ſpiritual court for the tithes of the ſaid "wood, in the name of this word called *Sylva Cæ-*"*dua*, whereby they cannot ſell their woods to the

" very value, to the great damage of them and of the " realm; it is ordained and eſtabliſhed, that a pro- " hibition in this caſe ſhall be granted, and upon " the ſame an attachment, as it hath been uſed " before his time."

The wood intended in this ſtatute, is ſuch as is fit for building of houſes and ſhips; and therefore, without doubt it comprehends oak, elm and aſh; but it hath alſo been adjudged to include beech as timber, in *Buckinghamſhire*, and ſome other counties, where better timber is not to be had, or is very ſcarce. And thoſe trees are free, not only as to the trunk or timber, but alſo as to the bark, root and germins that grew upon the ancient ſtock; and it is not material, how often or how ſeldom the branches thereof are lopped, becauſe being once free, they are always free. 2 *Inſt.* 643.

And it hath been alſo reſolved, that oak under twenty years, being fit for timber in time to come, ſhall not pay tithe; and that though it ſtands till it is rotten, and unfit not only for timber, but for all manner of uſes, except the fire, it ſhall be privileged, upon this general maxim, that once diſcharged and always diſcharged. 1 *Rol. Abr.* 640.

But in the caſe of *Buckel* and *Vavacre*, 1692. upon a bill for tithe wood in *Erith* in *Kent*, above twenty years growth, part uſed for timber, and part made into billets and fagots; it was reſolved, that the laſt ſhall pay tithes: for the trees being above twenty years growth alone will not privilege them, but the uſe; and the ſame reſolution was in the caſe of *Acton* and *Smith*, which was reheard and reviewed; and of *Francklin* and *Jones*, in the year 1694; and alſo in the caſe of *Cowper* and *Layfield*, *Bunb.* 99.

And

And in the case of *Greenaway* and the earl of *Kent*, *H.* 1704, timber-trees above twenty years growth, cut and corded for fuel, and the bark stripped from the same, were adjudged to pay tithes, as well as underwood; but that no tithe was due for such wood above twenty years growth, nor of the bark thereof, which was not corded. *Bunb.* 98.

But finally, in the case of *Walton* and lady *Mary Tryon*, *December* 15, 1751. The plaintiff brought his bill, as rector of *Mitcham* in *Surry*, for the tops and lops of old pollard oaks, ashes, and elms; and the tops, lops and bodies of beeches.—Mr. *Wilbraham* argued for the plaintiff: the tithe of wood is certainly payable; and the law, as to this, is now pretty certain. The 45 *Ed.* 3. is an explanatory law; and all lops and tops are tithable if the tree be under twenty years growth. Before the statute of *Sylva Cædua*, all were tithable; but by that law it is declared, that all timber trees should be exempt: and the reason is plain; for timber trees yield but one profit, and that but once in a century; and therefore, as it was so long before the owner had a profit, that wood was exempt. But even by this act it was not meant that the whole tree was exempt; the body only, not the tops and lops were so. Since this act, the courts have gone so far, as to exempt all parts of the tree: And even germins from these trees have also been determined to be exempt. After this, the courts endeavoured to bring it to some rule; and the buyers were always to pay the tithes. Afterwards, the courts held, that trees not converted to the use of timber were tithable; and on this some cases have been determined. As the case of *Man* and *Sommerton*, 1 *Brownl.* 94. So the case of *Howes* and *Cornwal*, 1 *Lev.* 189. where it is said, that wood for fire-wood, tho' of twenty-years growth, shall pay tithe when felled. So in

the caſe of *Rapley* and *Llyod*, all wood for burning was held tithable. In the caſe of *Briggs* and *Martin*, *T.* 6 *W.* a bill was brought by the plaintiff, as leſſee of the rectory of *Bromley* in *Kent*, for tithe wood made into bavins: The defendants by their anſwer inſiſted, that old pollards and dotards paid no tithe; but notwithſtanding this, the court decreed an account and ſatisfaction to the plaintiff for them. The courts ſeem to have gone a ſtep further. They have had regard to the uſe made of the wood, and not to the age of the pollard; namely, what was uſed for timber, and what for fire-wood; the former was held to be exempt, the latter to pay tithes. And agreeable to this was the caſe of *Greenaway* and the earl of *Kent*, before the lord chief baron *Ward*. The bill was brought by the plaintiff as vicar of *Walford* in *Herefordſhire*. The defendant inſiſted, that no tithes were due of ſuch wood as was above twenty years growth. A croſs bill was brought. And on hearing, the court declared, that the plaintiff was intitled to the tithe of all wood above twenty years growth as well as under, which was corded, but not otherwiſe. But it may be objected, ſhall tithes be ſo uncertain as to be determined by the uſe of them? I anſwer, that in many caſes, tithes muſt depend upon the uſe of them. As in wood, if it is made into bavins for firing it is tithable; if to make fences, it is not ſo. So if one fats cattle on land, agiſtment is due for them; ſo if he keeps cattle as barren, tithes are paid: But cattle kept for the plough are exempt, and even thoſe reared for the plough are exempt. Theſe are all eſtabliſhed caſes, and do not want any confirmation. The caſe of *Brook* and *Rogers*, *Moor* 908. is very expreſs, that if timber is lopped before twenty years growth, tithes ſhall be paid of the loppings. And if theſe trees in queſtion have been conſtantly cut, and tithes have been

been paid of them without any contradiction (as is now in proof,) why is not this an evidence that theſe trees were cut before twenty years growth, and out of the ſtatute of *Sylva Cædua?* And this preſumption may more naturally ariſe in this caſe, for the falls here happen but once in ſixteen or twenty years; and one of the plaintiff's witneſſes ſpeaks to tithes being paid of theſe trees forty-five years ago without any moleſtation whatſoever; and not one witneſs is produced for the defendant, who will venture to ſwear, that ever one load of timber was cut without paying tithes: And if that be the caſe, the natural preſumption is that this wood is tithable; for it has paid tithes, as long as memory can go back. As to the *beech*; if it be timber, as inſiſted upon by the defendant, then it comes within the ſtatute of *Sylva Cædua.* And this matter muſt be tried, if the parties think it worth their while to diſpute it.—By Mr. Solicitor general, for the defendant: The queſtion now put is, whether the tops and lops cut from trees above twenty years growth are liable to pay tithe, if cut in order to be uſed as fuel. And this is a queſtion of a very extraordinary nature indeed, and contrary to both old and modern law; for no point was ever laid down more clearly, from the time of *Edward* the *Third* to the preſent time, than this, that tops and lops of trees above twenty years growth, are always exempt: And the reaſon is, when once a tree is privileged, it always remains ſo. The caſe in *Moor* 908, cited for the plaintiff, is expreſsly for the defendant; for that particularly ſtates, that if not cut within the twenty years, then it is exempt. And ſo have been abundance of other caſes. And how can the right of the parſon ariſe from the *uſe* of the thing? How is it poſſible for the parſon to know the owner's intent? The right therefore ought to commence from the time it is ſo cut and ſevered. The earl of

Kent's

Kent's caſe does not prove the preſent diſtinction; for that proves, that the trees themſelves were in queſtion; and nothing at all was ſaid of the lops and tops. Beſides, they were not pollards or dotards, but young oaks. This proves, that all trees cut down and uſed for fire, would be liable to tithes. But this proves too much. But there is a note on the back of Mr. *Brown*'s brief in that cauſe (which I have), that ſettles what this caſe was: he ſays there was poſitive evidence, that the trees corded had grown from ſtems of old wood, and was formerly coppice wood; and this will alter the caſe greatly. The caſe of *Layfield* and *Cowper*, *T.* 1698, was on a bill for tithes of lops and tops of timber trees; the defendant inſiſted, that they were the product of beech and aſh trees; he admitted, he did convert them to fuel and cordwood; but, in regard that they were above twenty years growth, inſiſted, that they were exempt: by the decree, an account was directed for wood in general; and exceptions were taken to the remembrancer's report, that he had taken no notice that theſe beeches were ſome thirty, ſome fifty years growth, and were timber, and therefore exempt; and of that opinion was the court. In the caſe of *Bibey* and *Huxſley*, *H.* 1724, the bill was for tithe of coppice and other wood: the defendant inſiſted, that he had felled ſeveral timber trees of twenty years and upwards, and dug up ſeveral roots, and made them into ſtocks, and made the tops into fagots; ſome were uſed for repairs, others for fuel; and as theſe were all above the age of twenty years, the body with all the reſt are exempt from paying tithes by law: and it was decreed, that the plaintiff ſhould have an account of the tithe-wood; except for the tithe of oak, aſh, and maiden trees of beech proceeding from ſtools above twenty years growth: the application therefore to *fuel* does not make the difference.

But

But it is objected, that it muſt be preſumed theſe trees now in queſtion were cut before twenty years growth; and therefore never had the privilege: but as that is not charged by the bill, it cannot be preſumed. As to the beech, if inſiſted on, it muſt be tried. —— By the lord chancellor *Hardwicke*; The tithes demanded by the bill are of two ſorts; Firſt, tops and lops of old pollard oaks, aſhes, and elm; Secondly, beech-trees, both body and branches. The principal queſtion ariſes on the tops and lops of old pollard oaks, and the reſt. There is no difference in point of fact. It is admitted on both ſides, that there is no coppice wood in this ground; that they are ancient pollards: and as to the beeches, that they are of twenty years growth and upwards, and the greateſt part of them was cut and made into billets, and ſold for fire, except a ſmall part of them which was uſed for poſts and rails. The plaintiff has proved, that at two former falls, tithes were ſet out and taken of this wood, the one in 1712, the other in 1728; on the other hand, the defendant has not proved any fall when tithe was not paid; but has proved, that in theſe two falls the family lived in *Northamptonſhire*, and knew nothing of their being ſet out and taken, and that no other wood in the pariſh does pay tithe, or ever had paid. The plaintiff has founded his right on this; namely, the *uſe* and application of the things of which tithe is demanded: but though this be the general right ſet forth in the bill; yet if any other right appears, the plaintiff will be intitled to an account. This is a queſtion of very great conſequence, both to the owners of wood, and to the clergy alſo; and has been argued both from *reaſon* and *authorities*. And upon the *reaſon* of the thing, it has been ſaid, that there is no more reaſon why tithes ſhould not be paid of wood, than of any other product of the earth, for it *annuatim renovat*: but this proves too much;

much; for according to this reaſoning, all wood in general would be liable; and though this does *annuatim creſcere*, yet it does not *annuatim renovare* at Common law, coppice-wood is ſubject to tithes, though it does not *annuatim renovare*; yet in its nature it ought to pay; for it is cut under a certain courſe of years, and is looked upon as an ordinary ſtated renewal, like the caſe of ſaffron; but of timber trees, the ſtated rule is otherwiſe; there the law does not wait for a ſtated courſe of felling. It was further reaſoned for the plaintiff, that the lops and tops of pollards are tenancy profits: but this is no rule of tithes, and varies in different counties; and would make the affair of tithes very uncertain; and in many places the lops of ſpiral trees are allowed to the tenants for fire-wood, and yet ſuch lops are not tithable. It was further ſaid to be reaſonable, that the *uſe* and application ſhould determine whether the thing was tithable or not; that as a coppice is liable, ſo it is reaſonable that any other wood, not timber, but uſed for fuel, ſhould be ſo too. But this goes to the queſtion put in the iſſue by the bill, and I am afraid would be a very dangerous innovation; the ſubſequent uſe of the thing, as it does not alter the nature, cannot give a tithable quality which it had not before; if it could, why not *vice verſa*, that is to ſay, if wood not timber ſhould be applied to the uſe of timber, why ſhould not ſuch uſe exempt it from the payment of tithes? this was never heard of, yet it is equally reaſonable. It is ſaid, there are certain caſes where the uſe and application of the thing ſhall make it tithable; and there will appear no greater uncertainty in one caſe than in the other; as for inſtance, wood cut to be burned in the houſe of a pariſhioner, this was ſaid to be not liable; but that is not true, unleſs by cuſtom; for it was otherwiſe determined in the caſe of *Norton* and *Fermer*, *Cro. Car.* 113. It was ſaid alſo, that cattle for the

plough and pail are not tithable; ſo there the uſe determines: but this is not a predial, but a mixt tithe, which the pariſhioner is not obliged to ſet out at a particular place or time; and the parſon receives it in another manner, by taking the tenth part of the profits. In many caſes it is impoſſible to ſay, to what uſes the wood may be applied: the owner may ſell it ſtanding, the buyer to cut it; and if ſo, how is the intention to be known? and in many counties where timber is very plentiful, there it is often cut down and uſed as fuel; and if the uſe and application was to prevail, it would make two different Common laws of tithe, and this without any cuſtom: the law for tithes of wood is a poſitive law, to wit, that of all timber trees of twenty years growth or upwards, whether timber by law or cuſtom, no tithe is to be paid, either of bodies, lops, or tops. It has been much controverted, whether the ſtatute of *Sylva Cædua* is a new law, or only declaratory of the Common law: the latter is now the ſettled opinion; for the words of the ſtatute are, *it has been uſed of old.* In the ſtatute, the wood is particularly mentioned, and its age and growth; but not one word is ſaid of the uſe: and the opinion of all the courts upon the conſtruction of this ſtatute has been, that where the tree is timber, by law or cuſtom, of twenty years growth or upwards, it is exempt: and in 2 *Inſt.* 642, 643. the rules are very particularly laid down. Theſe rules have not been contradicted, except in the caſe of germins that came from old ſtools, and which is the caſe of moſt coppices in *England.* But it is aſked, what difference is there, if germins grow from trees intirely cut down, or from trees that have been lopped? I anſwer, that the difference is great; for in the caſe of germins that come from ſtools, no tree remains from whence the privilege is derived; but in the caſe of lops and tops the tree remains, and ſo does the privilege.

I come

I come now to consider the *cases* cited against this doctrine by the counsel for the plaintiff. The case of *Man* and *Somerton*, 1 *Brownl.* 94. is not applicable to the present case. The case of *Hawes* and *Cornwall*, 1 *Lev.* 189. is this, "Wood cut for fire-"ing, though above twenty years growth, shall "pay tithes; and so pollards, if above fifty years." But this was very short and imperfectly stated, and is not supported by law at all; and by a report of the same case, 1 *Sid.* it is said, that the wood was coppice wood; and by the determination, most probably it was so; and therefore proves nothing for the plaintiff. But it is said, there is no difference between pollards and underwood, for pollards are not timber: but I answer, that pollards having gained this privilege, always retain it; and the bodies of pollards may serve to many uses, as timber doth; and if dotard trees are privileged, much more ought pollards. The next case cited was that of *Brigs* and *Martin*, which was on a bill for lops and tops of old pollard and dotard trees; and an account was accordingly directed: but on what this was founded does not appear, nor whether these pollards were under the time of privilege or not; and what makes this case the more extraordinary is, the decree in the case of *Northley* and *Colbe*, in the very next term, and it is directly contrary; and the only way of reconciling these two cases, is, that in the first case it must have appeared that the pollards were cut before twenty years growth. *Greenaway* and the earl of *Kent* was the next case, and most principally relied on; and the ground of this decree was, that all wood, even above twenty years, that was cut and corded, should be tithable; and goes further than any case before or since: but the lord chief baron *Ward*, in that case, was of a quite different opinion, and made a learned argument against the decree; but the other three barons differed from him; therefore, I observe

ſerve, this was not a uniform authority; and I think the chief baron *Ward*'s was the beſt opinion: baron *Price*'s reaſons in that cauſe, do not ſatisfy me at all; when he was conſidering the ſtatute of *Sylva Cædua*, he ſaid, that ancient ſtatutes muſt be conſtrued according to the intent, and not literally; and that *great wood* does not in its ſtrict ſenſe mean trees of this ſort, but ſuch wood as is applicable to large buildings; which is in effect to ſay, that a tree, which in its nature is timber, yet if it is not large, and is applied to firing, ſhall be tithable: another ground that he went upon, was the ſtatutes relating to the rules of felling of wood; but theſe are rules laid down only for the preſervation of timber, and cannot be applicable to tithes that were demanded of them: and upon the whole, this determination is directly contrary to all the other authorities; for there is a *tempus conſtitutum*, and that cannot be departed from; and I will ſay further, that there has been no precedent ſince to follow it; for as to that caſe of *Bibey* and *Huxley*, that is rather againſt it. If theſe trees now in queſtion, were lopped and made pollards before twenty years growth, and ſo have continued to be lopped, then they will be liable to tithes: but this is a queſtion of fact proper to be tried, being too much for me to determine, upon the evidence now laid before the court: I am rather inclined to think that they were not, for the plaintiff himſelf, in his bill, has ſtated them to be ancient pollards, and large. The ſecond queſtion relates to the tithe of *beeches*, both bodies and branches: and it is not diſputed, but that this wood is above twenty years growth; and then the matter of fact muſt be tried whether it is timber by the cuſtom of the county: and if ſo, it will be exempt; otherwiſe it muſt pay tithes. 2 *B. E. L.* 411, 416

This was declared to be tithe-free, as part of the freehold, 22, 23 *Car.* 2. as it had been declared before

Turf.

before by lord *Coke*. *Gibſ.* 685. 1 *Mod. Rep.* 35. 2 *Inſt.* 651.

Turkeys. If the reſolution upon this head was really as *Moor* reports it, *viz.* that tithes are not payable of turkeys, nor their eggs, *quia feræ naturæ*; it is not eaſily conceived, upon what conſideration they ranked them under that head: or, ſuppoſe *feræ naturæ* there, relates only to partridges or pheaſants, which come between; it is no leſs difficult to conceive, why turkeys (if they are not *feræ naturæ*) ſhould be diſcharged of tithes, more than tame fowl of other kinds. *Gibſ.* 685. *Mo.* 599.

In the caſe of *Carlton* verſus *Brightwell*, before the Maſter of the Rolls, it was delivered by him as follows: I cannot ſee, but that turkeys are birds as tame as hens or other poultry, and therefore muſt pay tithes. It is true, if tithes be once paid of the eggs, there can be no demand made a ſecond time, in reſpect of the chicken hatched afterwards. 2 *P. Will.* 462.

Turnips. In this cauſe the court declared, that where land is ſown with turnips after the corn is cleared, and fed with ſheep and barren cattle, that tithe ſhall be paid of ſuch turnips; though it was inſiſted upon for the defendant, that the ſoil in that county (*Staffordſhire*) was dry and ſandy, and that this method of huſbandry improved the land, ſo that the plaintiff had *uberiores decimas* of corn, and had received the tithe of lambs and wool of the ſheep ſo fed, before; but the court over-ruled this defence; and ſaid, it amounted to a *non decimando*, as to tithes. *Hil.* 1731. *Bunb.* 314. See *Garden*, *Clover*.

Waſte. By the ſtatute 2 *Ed.* 6. *c.* 13. *ſect.* 3. the tithe of cattle feeding on large waſtes, where the pariſh is uncertain, ſhall pay tithe to the incumbent of that pariſh, in which the owner of the cattle dwells; unleſs limited otherwiſe by cuſtom or preſcription. *Gibſ.* 685. *Sav.* 60.

Where

Where the ſurmiſe was, that in the county of *Southampton* willows were uſed as timber, it was judged, that they are not tithable, and a prohibition was granted. But elſewhere, if willows are growing about a houſe, though it is waſte to fell them, yet being felled, tithe ſhall be paid of them. *Gibſ.* 685. *Hob.* 219. Willows.

Anno 28, 29 *Eliz.* preſcription by one to pay but 6 *s.* 9 *d.* for the tithe of all willows cut down by him in ſuch a pariſh, was declared an ill preſcription; becauſe, if he cut down all the willows of other men too, but 6 *s.* 9 *d.* ſhall be paid for all. But to have preſcribed for all willows cut down upon his own land, would have been good. *Gibſ.* 685. *Godb.* 61.

This growing in the nature of an herb, the tithe thereof is a ſmall tithe, as was agreed by all the juſtices, in the caſe of *Udal* and *Tindal*. 1 *Car.* 1. 3 *Cro.* 28. *Hetl.* 77. Wood.

The caſes relating to wood may be reduced to four heads: Wood.

1. How far and in what reſpect wood is tithable. In the caſe of the earl of *Clanrickard*, 17 *Jac.* 1. it was ſaid by *Henden*, that, originally, tithe was not paid to the clergy of wood, before the time that archbiſhop *Stratford* made a conſtitution (17 *Ed.* 3.) that tithe ſhould be paid within his juriſdiction, of *Sylva Cædua*. But although that conſtitution, by the tenor of it, ſeems to extend to wood in general, it is to be obſerved, that the petition of the commons againſt the clergy, in the very next parliament (18 *Ed.* 3.) was not, for taking tithe of wood, but of every manner of wood, *i. e.* of great trees, as well as of the reſt. And there are a great number of petitions in the rolls of parliament, during that reign, praying relief in the ſame caſe; which ſeems to imply, that that was the only grievance they laboured under, as being againſt the Common law and cuſtom of the

realm; for if the demand of tithe of other wood had alſo been againſt cuſtom, why did not all the petitions run againſt tithe of wood in general? At the ſame time, it muſt be acknowledged, that the commons ſay, in one of their petitions, 2 *Rich.* 2. that before the firſt peſtilence, no tithe of any manner of wood was given, granted, or demanded; and we find there was a great peſtilence 22 *Ed.* 3. *Gibſ.* 685, 686. *Palm.* 39.

It was reſolved, in the caſe of *Norton* and *Farmer*, that *de jure*, *per legem terræ*, no perſon can be diſcharged of tithe of wood, even though it be fewel and hedging; and that therefore it hath been uſual in prohibitions, to alledge hearth-penny, or the like, for the diſcharge: from whence it follows, that where ſuch conſideration or recompence to the parſon is not alledged, tithe is due *de jure*; with which ſuppoſition, the admitting of a bare cuſtom *de non decimando*, in caſe of wood, ſeems hardly reconcileable. *Gibſ.* 686. 3 *Cro.* 113.

It was ſaid, in the forementioned caſe of the earl of *Clanrickard*, that though tithe of wood is not of annual payment, yet is of annual growth; and that therefore, (as it ſeemed) there could not be a preſcription of trees *de non decimando*. Gibſ. 686. Palm. 38.

In the caſe of *Hicks* and *Woodſon*, *H.* 8 & 9 *W.* it is ſaid, that wood is not *de jure* tithable, becauſe it doth not renew annually; and that therefore in libels in the ſpiritual court for wood, they alledged a cuſtom, although it was ſaid, that the practice of the ſpiritual court at this day is otherwiſe: but the court did not regard that; for *Holt*, chief juſtice, ſaid, that they made ſtones, gravel, and all things tithable. Ld. *Raym.* 137. 2 *Salk.* 656.

But in the caſe of *Jordan* againſt *Colley and others*, *E.* 1720, on a bill by the rector for tithe wood in the pariſh of *Little Wenlocke* in the county of *Salop*, as it had been time out of mind paid

paid in that parish, against the defendants, as venders of sir *William Forrester*; the defendants in their answer say, that no tithe had been paid for this coppice wood, called *Holebrook* coppice, when felled before, and that they never heard that any tithe or *Modus* had been paid for wood in that parish. It was insisted upon for the defendants, that tithe wood was not due of common right, and therefore, that the proof lay upon the plaintiff, and that it was only founded upon a canon in bishop's *Stratford's* time; and therefore, that the defendants need not alledge any prescription or custom by way of exemption. But it was answered for the plaintiff, that occupiers must always set forth an exemption. And by the court; The defendants ought to have shewn some exemption; and there is no instance, that a parish can prescribe *in non decimando* for tithe wood; wilds and hundreds are upon another consideration.——But note, says the reporter, although the court decreed against the defendants, yet it doth not seem to have been yet certainly determined, that tithe wood is due of common right. *Bunb.* 61.

But in the case of *Boulton* and *Hurster*, T. 2 *G.* 2. the plaintiff having libelled in the spiritual court for the tithe of *Sylva Cædui*, the defendant moved the court of King's bench for a prohibition: and the suggestion was, that they were timber trees, and of twenty years growth. It was urged further, that the court might grant a prohibition, even upon the face of the libel; because the demand is set forth generally, and therefore must be intended that this tithe is due of common right; whereas the right of the tithe wood is only by custom. And that was the reason given in the case of *Hicks* and *Woodson*, why a hundred may prescribe in a *non decimando* of the tithe wood; for as by custom it grows due, by custom it may be made not due. But the court said, that this

reaſon indeed was laid down by the judges of this court, in that caſe; but they ſaid, this has never been allowed for law by any of the other judges of *Weſtminſter-hall*, and it certainly is not law: for tithe is as much due of *Sylva Cædua*, by the law of *England*, as any other tithe whatſoever. And judge *Reynolds* ſaid, this may evidently be ſhewn not to be the reaſon of this law, in relation to hundreds; for if it was, the ſame reaſon would prove that every private man may preſcribe in a *non decimando* of this nature. And for this reaſon, and alſo becauſe the defendant in the ſpiritual court had not alledged in his plea there, that the trees were of twenty years growth, a prohibition was denied. 1 *Bernard.* 71.

2. What ſort of tithe wood doth yield. That it is predial, is plain; but, whether great or ſmall, hath been a queſtion between the parſons and the vicars. And, in the caſe of *Reynolds* and *Green*, ſomething is delivered that tends to that point. "By the opinion of the whole court clearly, the "parſon *de mero jure* ought to have the tithe-"wood, if the vicar be not endowed of the ſame, "or claims to have it by preſcription: but with "ſuch a donation or preſcription, the ſame belongs "to the parſon." And in the ſequel of that caſe, it is expreſly declared to be a great tithe, and implied that it could not paſs under the terms *altaragia & minutæ decimæ*, but in virtue of the conſtant uſage of paying it to the vicar. But 4 *Car.* 1. in the caſe of *Wood* and *Greenwood*, it was held, that wood is *minuta decima*; and the two caſes of *Tindal* and *St. Albans* are referred to for proof of it: which ſeems alſo to be ſuppoſed in the caſe of *Tildell* and *Walter*, 21 & 22 *Car.* 2. where a vicar libelled in the ſpiritual court for tithe wood; and the ſuggeſtion to obtain a prohibition was, that time out of mind they had paid no ſmall tithe

to

to the vicar. *Gibſ.* 686. 2 *Bulſt.* 27. *Littl.* 243. 1 *Mod. Rep.* 50.

Amidſt this variety of judgments, we can only ſay theſe two things: 1. That, in common opinion, wood paſſes for a great tithe; 2. That, in controverſies between parſon and vicar, where the endowment is loſt, this point is determined by preſcription; and in caſe the endowment remains, and doth not expreſly mention wood, and yet that tithe hath been uſually taken by the vicar, the law will, by favourable conſtruction, either graft it upon ſome general expreſſion in the endowment, (as in the forementioned caſe of *Reynolds* and *Green*,) or elſe preſume that there might be a ſubſequent augmentation of the endowment of the vicar, by which he became entitled to tithe-wood. *Gibſ.* 686.

That wood is a predial tithe is plain; but whether great or ſmall, hath been a queſtion between the parſons and vicars; and it hath been reſolved, that if a vicar be only endowed with the ſmall tithes, and have, by reaſon thereof, always had tithe wood; in ſuch caſe it ſhall be accounted a ſmall tithe, otherwiſe it is to be accounted amongſt the great tithes. *Deg. p.* 2. *c.* 1.——But this doth not alter the quality of the tithe; and the vicar's having received it, may be evidence of a grant thereof having been made ſubſequent to the endowment, although ſuch original grant is now loſt; but is not evidence that wood in itſelf is a ſmall tithe.

3. How many ways may wood be diſcharged of tithe? and thoſe are reducible to three heads; with regard to the age it is of, the uſe it is put to, and the place of its growth. 1. With regard to the age; timber-trees, of or above twenty years growth, are diſcharged by the ſtatute of *Sylva Cædua*; (which ſee under *Trees*). 2. With regard to the uſe it is put to; wood for the owner's firing, hedging

and fencing of the premiſſes within the ſame pariſh, hath been adjudged tithe-free; but this is to be alledged, not abſolutely, that *per legem terræ* wood ſo applied ſhall not pay tithe, but *ſub modo*, that the parſon hath ſome conſideration for it, or at leaſt that the houſe is for maintenance of huſbandry, by reaſon of which the parſon hath *uberiores decimas*. By which rule, if a man hath an houſe of huſbandry with lands, and demiſing the lands, reſerveth the houſe, tithe of firewood is payable. In the caſe of *Scoles* verſus *Lowther*, it is declared, that where a man has wood in one pariſh, and arable land in another, if he makes uſe of this wood in making fences for his arable land, yet he ſhall pay tithes to the parſon where the wood grows; but it had been otherwiſe if it had been the ſame pariſh. 3. With regard to the place of its growth; as the Wild of *Kent*, (ſaid to contain twenty pariſhes) and the Wild of *Suſſex*; within which, a preſcription to be diſcharged of tithe of wood, (though diſallowed 12 *Jac.* 1. in the caſe of *Ruſſel* and *Backhurſt*), hath been often held to be good, upon this ſuppoſition, that tithe of wood in general is due by cuſtom only, (which, by the way, hath been often ſaid, but never proved) and that therefore it is not within the rule againſt preſcriptions *in non decimando* by lay-men; which rule they extend only to tithes that are due *de jure*, as corn, hay, and the like. *Gibſ.* 686. 3 *Cro.* 113. *Mo.* 683. *Littl.* 52. *Keb.* 319. *Sand.* 136. 1 *Vent.* 75. *Siderf.* 447. *Skin.* 561. Ld. *Raym.* 130. 2 *Bulſt.* 285. *Palm.* 37. *Hetl.* 110.

4. What is the manner of tithing wood? It was ſaid by *Hobart*, in the caſe of *Hide* and *Ellis*, that in divers places they fell out the tenth acre of wood ſtanding; and ſo it may be by the pole or perch, or by the tenth fagot or billet, according as the cuſtom of the place hath been. *Hob.* 250.

Wool. There is no diſpute concerning the kind of tithe which wool yields; for it is agreed by all to be mixt, and was declared, in the caſe of *Ward*,

to

to be a ſmall tithe. Nor is there any doubt, but that it is *de jure* tithable: So that it hath been adjudged, that, however for the bodies of ſheep killed, and ſpent in the houſe, no tithe ſhall be paid, yet the wool ſhall pay tithe; and for theſe, as well as for rotten ſheep which die, a conſultation is provided in the *Regiſter* in theſe words, *De decimâ lanæ provenientis de ovibus eorundem parochianorum infra eandem parochiam occiſis, & morientibus, a feſto S. Michaelis uſque ad feſtum Paſchæ, ſingulis annis.* And ſo, in a ſuit for neck wool, where the defendant in the ſpiritual court prayed prohibition, upon this ſuggeſtion, that they uſed between *Michaelmas* and *Allhallowtide* to cut the head, neck and ears, to preſerve their ſheep from vermin and flies, and by this to make the fleece the better, and that they were to pay the tenth fleece at ſheering time, but not to pay any of theſe neck-fleeces, being, as they alledged, of no value: In this caſe prohibition was denied, becauſe the parſon had the ſame right to the tenth fleece of the neck, as to the tenth fleece of the back; and becauſe the allowing this cuſtom might be the foundation of great fraud, and an opportunity of ſpoiling the fleece under colour of neck-ſhearings. But when the forementioned ſuggeſtion ſucceeded not, another was found, *viz.* that they uſed to wind up the other fleeces for the parſon at their own charge; and this obtained a prohibition, notwithſtanding all the former reaſonings of the court. But, according to *Rolle*, conſideration was alſo had of that other circumſtance of clearing them from vermin, inaſmuch as it appeared, that the ſhearing at that time of the year could not be for the fleece of the wool. Nor ſhall tithe be paid of locks of wool, if it appear that they were caſually loſt, but otherwiſe, if by contrivance and fraud. *Gibſ.* 686, 687. *Poph.* 144. 1 *Rol. Abr.* 646, 647. 3 *Bulſt.* 242. *Mo.* 911.

And with regard to the forementioned right of tithe-wool *de jure*; it was held in the caſe of *Nicols* and *Hooper*, 16 *Jac.* 1. that though a man pay tithe of lambs at mark-tide, and afterwards at *Midſummer* ſhear the reſidue, or the nine parts; though there are not above two months between the times of ſuch tithing and ſhearing, yet he ſhall pay tithe-wool of the reſidue, becauſe there is a new increaſe. *Gibſ.* 687. 1 *Rol. Abr.* 642.

And alſo if there be under ten pounds of wool, a reaſonable conſideration ſhall be paid; becauſe being due *de jure*, a *Modus in non decimando* cannot be allowed in any caſe. 1 *Rol. Abr.* 687.

But, as to the ſtrict right of tithe-wool; it hath been limited, by an allowance of the two following *Modus's*, as good: *viz.* 1. The tenth part of the wool of all the ſheep which he had before *Lady-day*, in ſatisfaction of all the wool of ſuch ſheep, as ſhould be brought into the pariſh *after Lady-day*. 2. To be diſcharged of tithe of thoſe he ſhould ſell but two days before the ſhearing, in conſideration that time out of mind he hath paid tithe-wool of thoſe which he bought but two days before the ſhearing. *Gibſ.* 687.

In the caſe of *Wilſon* and the biſhop of *Carliſle*, *T.* 13 *Jac.* *Wilſon* brought a prohibition againſt the biſhop, who held the living of *Grayſtock* in *Commendam*; and ſaid, that there was within the pariſh of *Grayſtock* this cuſtom for tithing of wool, that if any inhabitant have five fleeces of wool or above, he ſhall, after the ſhearing and binding up of the ſame, without fraud or deceit, pay to the rector (after notice given) the tenth part thereof, at the door of the manſion-houſe of ſuch perſon inhabiting within the ſaid pariſh, without ſight or touch of the nine parts by the rector or his agent; and that the parſons have ſo accepted it. To this the biſhop demurred in law. And it was adjudged for

for the biſhop, with one conſent; for the ſubſtance of the preſcription is laid, that the very true tenth is and ought to be paid without fraud; which is not preſcriptible, for it is common right. Then the ſole point preſcriptible is, that this is without view or touch of the nine parts; which is, in effect, repugnant to the other: For when you have laid the truth in the former part, you lay the way to fraud in the latter. For it is againſt common reaſon, that any man judge or divide for himſelf, and then take choice of his own diviſion, againſt the rule of partition laid down by *Littleton*; for the truth of the tenth depends upon the proportion it holds with the nine parts; and therefore, for the pariſhioner to ſet out a part for the tenth, which he only affirms to be juſt, is to give him merely power to tithe as he liſts, and the preſcription were as reaſonable as to ſay plainly, that they might ſet out what tithe they pleaſed. And it is a weak anſwer to ſay, that if it be not a juſt tenth, he may refuſe it, and ſue for his due. For he hath no means to be aſſured whether it be true or not; ſo his ſuit may be cauſeleſs: Sure he may be, it will be fruitleſs. But the law was provided, not to cauſe, but to prevent ſuits; and therefore provides, that things be done by indifferent means and perſons, that there be no juſt ſuſpicion of indirect dealing. *Hob.* 107.

So in the caſe of *Chriſtian* againſt *Wren* and others, *M.* 1732; on a bill by the vicar of *Croſthwaite* in the county of *Cumberland*, for tithes, the defendant inſiſted on a cuſtomary manner of payment of tithe-wool of the elder ſheep, by weighing the wool, and delivering the tenth part, without fraud, to the vicar, without his ſeeing or touching it: But this was over-ruled, on the authority of the aforeſaid caſe in *Hobart*, *Bunb.* 301.

In

In the ſame caſe, the pariſhioners inſiſted, that they ought to pay no tithe of hog-wool, (that is, of the wool of ſheep of a year old); alledging, that no tithe thereof had ever been paid; that the tenth lamb having been paid (or compoſition for the ſame), the other nine ſhould not pay tithe of their wool that ſame year; and inſiſting further, that a *Modus* being paid for the tithe lambs, the ſaid *Modus* included alſo the tithe of the hog-wool. But the evidence not coming up to the proof of its being included within the *Modus*, and the other allegations being plainly ſetting up of a *non decimando*; it was decreed, that the tithes of the hog-wool ſhould be paid as well as of all the other wool. For it is clearly a new increaſe.

The title to tithe of wool being ſettled; there is another queſtion, *viz.* how the tithe ſhall be proportioned between the ſeveral incumbents, in caſe ſheep are removed from one pariſh to another, between the times of ſhearing; upon which head, the rule of the *Engliſh* Canon-law is ſet forth in the conſtitution of archbiſhop *Winchelſea*, *viz.* that tithe of wool ſhall be paid to the incumbent from the time of ſhearing till *Martinmas*, though they be afterwards removed: That, if they be removed, within the ſaid time, from pariſh to pariſh, each incumbent, in whoſe pariſh they ſhall remain at leaſt thirty days, ſhall have his proportion of the wool; but, if they be removed from pariſh to pariſh after the ſaid time (that is, from *Martinmas* to the time of ſhearing,) a reaſonable *agiſtment* ſhall be paid by the owners for the time they ſtay. But the Common law will not allow *agiſtment* to be paid of ſheep that are fatted, and ſold, becauſe they will render tithe of their wool, as was adjudged in the caſe of *Facey* and *Lange*, 7 *Car.* 1. and it was ſaid by *Jones*, (abſolutely, and with equal regard to all times of the year,) that if a pariſhioner ſells ſheep, the parſon ſhall have allowance of

of tithe-wool after ſhearing, (as of eighty pound of wool, the tithe of which is eight pound, there ſhall be for the half year's paſture, four pound; for a quarter of a year two pound, *&c.*) though the contrary was held, 2 *Car.* 1. that in ſuch caſe the incumbent out of whoſe pariſh they are ſold, ſhall have *agiſtment*, as is obſerved before under the title *Sheep*. So that, however plain and clear the rule of the eccleſiaſtical law is, the rules of the temporal law in this matter ſeem not to be eaſily reconciled; nor, with ſubmiſſion, does it ſeem fair, that a plain eccleſiaſtical law, in a merely eccleſiaſtical matter, ſhould be laid aſide, or over-ruled, without very good reaſon given for it. *Gibſ.* 687. 1 *Rol. Abr.* 647. *Latch* 254. *Poph.* 197.

A cuſtom to pay tithe in kind for ſheep, if they continued in the pariſh all the year, and an half-penny for every one that was ſold before the time of ſhearing, was adjudged an unreaſonable cuſtom, as evidently defeating the parſon of his juſt right. *Gibſ.* 687. *Mar. c.* 128.

As to the time of paying tithe-wool; *de jure* it is due, when clipped; but by preſcription it may be ſet out altogether at another time; and when the ſpiritual court diſallowed this plea, they were prohibited. 1 *Cro.* 702. *Mo.* 910.

Libel in the ſpiritual court for tithe of wool; the defendant pleaded, that by the antient uſage in the pariſh the tithe of wool was paid by the pound, and not by the fleece: And thereupon moved for a prohibition, as being a *Modus*. But the court held this was not a *Modus*, only a different manner of computing the *quantum*, wherein it is agreed that the tenth part is to be paid in all events. The prohibition was denied. *Mich.* 1 *Geo.* 2. *Stran.* 783.

It ſeemed to be admitted, that there ought to be paid tithe for the *agiſtment* of yearlings, being a new increaſe. *Mich.* 1721. *Bunb.* 90. Yearlings.

CHAP.

CHAP. V.

Of ſetting out, and taking and carrying away tithes.

All perſons obliged to ſet out tithes.

EVERY perſon is bound, of common right, to cut down, and ſet out the tithes of his land. So that when a parſon made a collector of tithes, and that collector licenſed a pariſhioner to carry away his corn without ſetting forth of tithes, it was declared a void licence. And in order to the due ſetting out, that it may be done faithfully, and without fraud; the laws of the church intitled the parſon to have notice given him; but by the declarations of Common law, ſuch notice is not neceſſary. The furtheſt they have gone, is, to declare a cuſtom of tithing without view, an abſurd cuſtom; and the ſtatute law (2 *Ed.* 6. *cap.* 13. *ſect.* 2.) intitles a parſon, though not to notice, to a right of ſeeing it ſet out. And if a queſtion be, in the ſpiritual court, whether tithe were ſet out, or not, no prohibition lies. *Gibſ. Cod.* 688. *Noy* 134. 1 *Rol. Abr.* 643. 2 *Vent.* 48.

Time and manner for ſetting out.

The time and manner of ſetting out tithes, (*i. e.* whether it is to be done, when the things are in ſheafs, or cocks, or ſhocks,) depends upon the particular cuſtom of every place; which is to be followed. The books of Common law declare, that, of common right, the owner is obliged to do no more, in order to the tithing of corn, than to bind it up in ſheafs; and it being a maxim, that every *Modus* muſt be ſomething for the advantage of the parſon, which the owner is not bound to do, the ſetting into cocks or ſhocks hath been offered as the foundation of a *Modus*, when no other pretence could be found; and particularly adjudged a good conſideration, for not tithing the odd ſheaves, under the number of ten. But they cite

no

no ancient teſtimonies, to make the tithing in ſheaves the Common law of tithing; and *Lyndwood* (who uſually diſtinguiſhes between what is due *de jure communi*, and what *de conſuetudine*) ſets all the method of tithing upon the ſame foot of *cuſtom*. *Aliqui* (ſays he) *decimant ſecundum* Garbas, *eas projiciendo ſparſim in ſulcos*; *alii decimant ſecundum* Acervos, *garbis invicem collectis*; *alii decimant non in* Campis, *ſed in* Horreo *proprio*; *alii ducunt illam decimam ad horreum ſacerdotis*. And however ſtrange this laſt clauſe may look, *Lyndwood* lays it down as the law of the church, *Colonus de jure tenetur non ſolum decimas colligere & coarcervare, ſed etiam in horreum ſacerdotis afferre*. *Gibſ.* 688, 689. See 2 *Leon.* 70. *Latch* 125. *Palm.* 440. 2 *Keb.* 36. *Siderf.* 283.

The tenth land of corn, (inſtead of the tenth ſheaf or ſhock) beginning with that land which is nigheſt to the church, hath been adjudged a good cuſtom; notwithſtanding it was alledged, that the occupiers, knowing which would fall to the ſhare of the parſon, did not till, manure or ſow it, as they did the reſt; for this fraud (they ſaid) might be remedied by an action at Common law. Might not the cuſtom as well be declared, a cuſtom againſt reaſon, when the preſumption is ſo ſtrong, that in ſuch caſe the occupier will not beſtow equal care upon it, as upon his own; and when it is ſo difficult to ſtate the degrees of care, taken or required; and ſince, if due care be not taken, no remedy is left, but what (conſidering the difficulty of proof, and other circumſtances) is worſe than the diſeaſe? *Gibſ.* 689. *Mo.* 913.

It is ſaid to have been agreed by all the juſtices in the Common pleas, (29 *Eliz.*) that by the Civil law the parſon ought to have his tithe by the tenth ridge: But not ſo, I ſuppoſe, as to let the occupier know which parts he was to neglect, by making it neceſſary to begin of courſe with the ridge which was nigheſt

nigheſt to the church. The maxims of Civil and Canon law are not uſually overvalued in our temporal courts; but the uſe which was made of this, was, that the reaping, binding and ſhocking, being (in conſequence of that doctrine) more than the owner was bound to do, theſe ſhould become a good *Modus* to diſcharge him of tithe for the hay growing in the head-lands. *Gibſ.* 689. 2 *Leon.* 70.

Tithes ſet out are lay-chattels.

Tithes being ſet out, or ſevered from the nine parts, become lay-chattels. This is the doctrine of all the law-books: And upon this foundation, when the tithe of corn was ſet out in ſheaves, and the parſon would not take it, but prayed remedy in the ſpiritual court, a prohibition was granted; and when a ſequeſtration was prayed in the temporal courts of tithes not ſet out, the right of which was in controverſy, the party was told, his requeſt had been reaſonable, if they had been ſevered from the nine parts. For the ſame reaſon, if after ſeverance they are carried away by a ſtranger, the remedy is in the temporal courts: And though it is otherwiſe, if carried away by the owner, the reaſon is, becauſe his ſetting them out in order to carry them away, is a fraudulent ſetting out. *Gibſ.* 689. 2 *Leon.* 201. *Sav. c.* 71. 1 *Cro.* 607. *Noy* 44. *Mo.* 502. 2 *Rol.* 440.

Parſon to take care of the tithes ſet out.

The care of the tithes, as to ſpoiling, *&c.* after ſeverance, reſts upon the parſon, and not upon the owner of the land. So it was declared in the caſe of Dr. *Bridgman*, that though the pariſhioner ought *de jure* to reap the corn, he is not bound to guard the tithes of the parſon; on the contrary, if the parſon does not carry them away in convenient time, an action on the caſe lies againſt him. But ſo, that the pariſhioner may neither bring ſuch action, nor put in his cattle, till he hath given notice to the parſon, that they are ſet out. And if tithes be ſpoiled, and the parſon ſeeketh remedy in the ſpiritual court, and prohibition is obtained upon falſe

ſug-

ſuggeſtions, a conſultation is provided in the *Regiſter*. *Gibſ.* 689. *Noy* 31.

In the caſe of *Gale* and *Ewar*, one point was, that the occupier, after ſeverance, took the nine parts, and turned his cattle into the meadows where the tithes were, which deſtroyed and conſumed the tithes. *Holt*, chief juſtice, ſaid, that though there was no obligation to give *notice* of the ſeverance, (as is adjudged in the caſe,) yet he thought the turning of cattle to the tithe, made it a *fraudulent* ſeverance, and that a ſuit might be maintained for it in the ſpiritual court. *Comyns* 22.

Parſon may ſpread and dry the tithes.

After the tithes are ſet forth, the parſon may of common right come himſelf, or his ſervants, and ſpread abroad, dry and ſtack his corn, hay, or the like, in any convenient place or places upon the ground where the ſame grew, till it be ſufficiently weathered, and fit to be carried into the barn. But he muſt not take a longer time for the doing thereof, than what is convenient and neceſſary; and what ſhall be deemed a convenient and neceſſary time, the law doth not, nor can define; for the quantity of the corn or hay, and the weather, in this caſe, are to be conſidered; and what ſhall in this, and all other caſes of like nature, be ſaid to be a reaſonable and convenient time, is to be determined by the jury, if the point come in iſſue, triable by a jury; but if it come to be determined upon a demurrer, or other matter of law, the judges of the court where the cauſe depends are to reſolve the ſame. *Deg. p.* 2. *c.* 14. *Str.* 245.

By the ſaid ſtatute 2 & 3 *Ed.* 6. *c.* 13. *ſect.* 2. if any perſon carry away his corn or hay, or his other predial tithes, before the tithe thereof be ſet forth; or willingly withdraw his tithes of the ſame, or of ſuch other things whereof predial tithes ought to be paid; and if any perſon do ſtop or let the parſon, vicar, proprietor, owner, or other their deputies or farmers, to view, take, and carry away their

their tithes, as is aboveſaid, he ſhall forfeit double value, with coſts, to be recovered in the eccleſiaſtical court.

Parſon to carry away his tithes in convenient time.

The parſon hath a right to carry away his tithes; and if that be obſtructed, he ſhall have remedy in the ſpiritual court. Accordingly, 8 *Jac.* 1. conſultation was granted in that very caſe, becauſe (it being to no purpoſe to ſet out tithes, if he who ſet them out, hinder them to be carried away), this was adjudged a fraudulent ſetting out; which, though poſſibly a good reaſon, ſeems not to be a true one, but to be uſed on purpoſe to ſave the maxim, of tithes being a lay-chattel after ſetting out; ſince (without the help of that diſtinction) the ſtatute 2 *Ed.* 6. *c.* 13. *ſect.* 2. doth in expreſs words give remedy before the ſpiritual judge, in caſe the parſon is ſtopped in carrying away his tithes; upon which it was reſolved, (43 *Eliz.* in *Blackwell*'s caſe), that the queſtion being in the ſpiritual court, whether the gate was locked, or open, no prohibition ſhould be granted. *Gibſ.* 689. 1 *Cro.* 844.

And the parſon may carry his tithes from the ground where they grew, either by the common way, or any ſuch way as the owner of the land uſeth to carry away his nine parts. But if there are more ways than one, and the queſtion is, which is the right way, this is cognizable in the temporal court. *Deg. p.* 2. *c.* 14.

And if the owner of the ſoil, after he hath duly ſet forth his tithes, will ſtop up the ways, and not ſuffer the parſon to carry away his tithes, or to ſpread, dry, and ſtack them upon the land, this is no good ſetting forth of his tithes without fraud, within the ſtatute: but the parſon may have an action upon the ſaid ſtatute, and may recover the treble value; or may have an action upon the caſe for ſuch diſturbance, as it ſeemeth; or he may, if

he will, break open the gate or fence which hinders him, and carry away his tithes. *Deg. p.* 2. *c.* 14.

But in this he muſt be cautious that he commit no riot, nor break any gate, rails, lock or hedges, more than neceſſarily he muſt for his paſſage. *Deg. p.* 2. *c.* 14.

And when he comes with his carts, teams, or other carriages, to carry away his tithes, he muſt not ſuffer his horſes or oxen to eat and depaſture the graſs growing in the grounds where the tithes ariſe, much leſs the corn there growing or cut: but if his cattle (as cannot be avoided) do in their paſſage, againſt the will of their drivers, here and there ſnatch ſome of the graſs, this is excuſeable. *Deg. p.* 2. *c.* 14.

It ſeems, that if tithes ſet forth remain too long upon the land, the owner of the ſoil may take them *damage feaſant*; but then, if he be ſued for them, in order to juſtify, he muſt ſet forth how long they had remained before he took them; and when they ſhall be ſaid to remain too long, is triable by the jury. *Watſ. c.* 54. Or an action upon the caſe will lie againſt the parſon for his negligence in this behalf: but no action in ſuch caſe will lie, unleſs the pariſhioner hath duly ſet forth his tithes, and hath alſo given notice to the parſon that they are ſo ſet forth. *Deg. p.* 2. *c.* 14. Ld. *Raym.* 187.

Caſe lies againſt a parſon, for not carrying away corn, being ſevered from the nine parts, but not treſpaſs *vi & armis*.

Caſe. The plaintiff declares, that he was poſſeſſed of divers cloſes in *B.* which he ſowed with corn, and when it was ripe, he reaped it, and made it into ſheafs, and duly ſevered the tithes thereof from the other nine parts; that the defendant was proprietor of the tithes; that the plaintiff required the defendant to take away the tithes off his land, but that the defendant did not take them away in convenient time, but ſuffered them to continue there upon the land from the fourth of *June* 6 *W.* 3. until the ſuing of this action; *per quod per totum tempus prædictum* the graſs did not grow

where the corn lay, and the plaintiff loſt the benefit of the reſidue of the graſs in that cloſe, becauſe he could not depaſture his cattle, for fear of doing damage to the corn. Not guilty pleaded. Verdict for the plaintiff, and intire damages given. Serjeant *Gould* moved in arreſt of judgment, that the action will not lie; becauſe the plaintiff might have prevented any injury which this corn could do to him. For as the tithes are duly ſevered, the property of them is veſted in the parſon; then if upon notice he does not carry them away, they may be diſtrained as *damage feaſant*, or treſpaſs will lie againſt him; as where an executor does not remove the teſtator's goods in convenient time after his death, the owner of the houſe where they are, may have treſpaſs againſt him. 2 *Cro.* 204. *Stodden* v. *Harvey*. Then when the law has preſcribed a remedy, the party muſt be contented with it, and ſhall not have any other. And therefore, in this court, in a caſe between *Thornton* and *Auſten*, *intr. Hil.* 4 & 5 *W.* & *M.* *C. B. Rot.* 1051. the plaintiff brought caſe againſt the defendant, and declared, that he was poſſeſſed of a cloſe, and the defendant dug pits in it, *&c. per quod*, *&c.* and, after verdict for the plaintiff, it was adjudged, that the action will not lie; becauſe the cauſe of action was properly treſpaſs, for which the party might have an action of treſpaſs, but could not turn it into an action upon he caſe. But the court anſwered, that doubtleſs in the principal caſe the action would lie; and ſo they ſaid it had been adjudged. See 1 *Rol. Abr.* 109. *pl.* 36, 37. And though it ſhould be admitted, that the plaintiff might have had treſpaſs againſt the defendant for not taking away the corn in convenient time, yet this was no argument, becauſe in many caſes the law allows a double remedy. But they held, as this caſe was, the plaintiff could not have treſpaſs, but only caſe; for he could not have treſpaſs

quare

quare vi & armis he did not take away his corn, which is but a *non-feaſance*. But they agreed, that the caſe of *Thornton* verſus *Auſtin* was good law; for the plaintiff turned that, which was properly treſpaſs, into an action upon the caſe, only with deſign to evade the ſtatute of 22 & 23 *Car.* 2. and to get full coſts, though the damages were under 40*s.* and that judgment of the caſe of *Thornton* and *Auſtin* the judges of the king's bench approved. [Note, for this ſame reaſon this term between *Hills* and *Clerk*, the plaintiff brought caſe againſt the defendant *quare amputavit et ſpoliavit* his corn, by which he loſt it; after verdict for the plaintiff, upon the general iſſue pleaded, judgment was arreſted.] Then *Gould* took another exception, that the plaintiff has laid two ſeveral damages in his *per quod*, and intire damages; then, if the action does not lie for the one part, the whole ſhall be arreſted; but (by him) the action does not lie for the loſs of the benefit of the graſs, becauſe he could not depaſture his cattle, &c. for he might have put in his cattle without danger; for if the defendant did not take away his tithe in convenient time after notice, the plaintiff might put in his cattle; and though they eat the corn, yet it would be *damnum abſque injuria*. Then, to ſuffer the plaintiff to bring an action, upon a ſuppoſal that he could not put in his cattle, when he might, is to ſuffer him to maintain an action for his own negligence; which the law will not permit. Againſt this *Birch*, ſerjeant, for the plaintiff anſwered, that the plaintiff could not have put in his cattle; no more than if leſſee for years, at the end of his term, leave corn upon the land, the leſſor might put in his cattle to eat it, which he cannot juſtify. For where a right is once veſted in a party, he who deſtroys it ſhall be a treſpaſſer. And he cited *Mich.* 22 *Car.* 2. *B. R. Rot.* 249. *Lutſcomb* verſ. *Porter*, the caſe *in termis* with the preſent caſe; and after verdict, judg-

ment there was given for the plaintiff. And it was adjudged *per curiam*, in this principal caſe, that the plaintiff could not put in his cattle and eat the corn; for if that ſhould be allowed, it would ſubvert the foundation of this action for the other part, which hath often been adjudged maintainable. Beſides that, it is unreaſonable, that the plaintiff himſelf ſhould be his judge, what is convenient time. And to permit him, if the corn is not removed at the day, to put in his cattle, and eat all the corn, would be a much greater loſs to the parſon, than that which the plaintiff hath ſuſtained by the continuance of the corn upon the land. But it is much more reaſonable to permit the plaintiff to bring an action againſt the parſon, and ſo the court to be judge of the reaſonableneſs of the time, and the recompence be proportionable to the loſs ſuſtained. And therefore judgment was given for the plaintiff. Ld. *Raym.* 187, 188, 189.

CHAP. VI.

Of the remedies for recovering tithes, and the ſeveral Acts of Parliament made for that purpoſe.

Tithes anciently recoverable in the County-court.

IN the *Saxon* times, tithes were recoverable in the county-court, where the biſhop, or his deputy, and the ſheriff, did ſit as co-ordinate judges, there being at that time no ſeparate court of ordinary eccleſiaſtical juriſdiction. 2 *Inſt.* 661.

Recoverable in the ſpiritual court, by the canon law, and by divers ſtatutes.

By a conſtitution of archbiſhop *Winchelſea*: "Foraſmuch as many are found, who are not willing freely to pay their tithes, we do ordain that the pariſhioners be admoniſhed once, twice, and thrice, to pay their tithes to God and the church: and if they do not amend, they ſhall firſt be ſuſpended from the entrance of the church, and ſo at laſt be compelled to pay their tithes by cenſures

" ſures eccleſiaſtical, if it ſhall be neceſſary: and " if they ſhall deſire a relaxation or abſolution of " the ſaid ſuſpenſion, they ſhall be remitted to the " ordinary of the place, to be abſolved and pu- " niſhed in due manner." *Lind.* 191.

By the ſtatute of *Circumſpecte agatis*, 13 *Ed.* 1. *ſt.* 4. " The king to his judges ſendeth greeting. " Uſe yourſelves circumſpectly in all matters con- " cerning the clergy, not puniſhing them if they " hold plea in court chriſtian, in the caſe where a " parſon doth demand of his pariſhioners obla- " tions or tithes due and accuſtomed: in which " caſe the ſpiritual judge ſhall have power to take " knowledge, notwithſtanding the king's prohibi- " tion."

Accuſtomed.] By this act, *Modus decimandi*, and real compoſition, are eſtabliſhed: for hereby are tithes divided into two parts; in *decimas debitas*, and that is *quota pars*, the tenth part; and into *decimas conſuetas*, which are due by cuſtom and uſage, in ſatisfaction for tithes; for which ſatisfaction, or *Modus decimandi*, the parſon may ſue in court chriſtian, and is warranted by this act: for the rule is, that the *Modus* is to be ſued for in the eccleſiaſtical court, as well as the very tithe; and if it be allowed between the parties, they ſhall proceed there; but if the cuſtom be denied, it muſt be tried at the Common law; and if it be found for the cuſtom, then a conſultation muſt go; otherwiſe, the prohibition ſtandeth. The like is affirmed, in caſe a jury, upon an iſſue joined in a prohibition upon a *Modus decimandi*, find a different *Modus*; ſince a *Modus* is found, they ſhall not have conſultation. *Gibſ. Cod.* 691. cites *Hob.* 247. *Noy* 81. *Hetl.* 133. 1 *Vent.* 32.

The principal reaſons why the courts of Common law prohibit the ſpiritual courts from trying of *Modus's*, are, that whereas every *Modus* is leſs than the real value, the rule of the Common law is,

that leſs than the real value ſhall not be taken, and that a cuſtom to the contrary is void; and, that the eccleſiaſtical and temporal laws differ in the times of limitation; forty years making a good cuſtom with the firſt; whereas, by the ſecond, it muſt be beyond the time of memory. *Gibſ. Cod.* 691.

To which it hath been replied, that though the general rule of the Common law, is not to admit leſs than the real value, yet there are ſeveral exceptions; as in caſes of perſonal, and ſmall tithe; in which cuſtomary payments are allowed, without breach of conſcience; the ſpiritual courts have commonly allowed pleas of *Modus decimandi*, and are ready to allow them; that the averment in the prohibition, is not, that they do take cognizance, but that the plea hath been offered, and refuſed; which ſuppoſes, that if the plea be admitted, the prohibition ought not to go; that, accordingly, it hath been affirmed by *Doderidge* and others, that they may as well try the *Modus*, as the right of tithes; and that prohibition is not to be granted, till the ſpiritual court either refuſe to admit the plea, or proceed to try it by methods different from the rule of the temporal law, as to the time of limitation, or number of witneſſes, or the like. And whereas my lord *Coke* contended for the contrary doctrine, it was declared by *Keling* and *Twiſden*, 20 *Car.* 2. in the caſe of *The biſhop of Lincoln* againſt *Smith*, that in caſe one libel for a *Modus decimandi*, if the ſpiritual court allow the plea, they may try it; and *Coke*'s opinion againſt trying penſions claimed by preſcription, in the ſpiritual court, they ſaid, was not warranted by the book. *Gibſ. Cod.* 691. *Still. Eccleſ. Caſ. p.* 311.

Ann. 1 *W. & M.* in the caſe of *Bradſhaw* and *Swanſton*, prohibition was denied, on ſuggeſtion of compoſition, in a ſuit of tithes. *Show.* 81.

By

By the ſtatute of *Articuli cleri*, 9 *Ed.* 2. *ſt.* 1. *c.* 1. "Whereas laymen do purchaſe prohibitions generally upon tithes, obventions, oblations, mortuaries; the king doth anſwer to this article, that in tithes, oblations, obventions, mortuaries, (when they are propounded under theſe names,) the king's prohibition ſhall hold no place, although for the long withholding of the ſame the money may be eſteemed a ſum certain. But if a clerk, or a religious man, do ſell his tithes, being gathered in his barn, or otherwiſe, to any man for money, if the money be demanded before a ſpiritual judge, the king's prohibition ſhall lie; for by the ſale the ſpiritual goods are made temporal, and the tithes turned into chattels."

In caſe of tithes, obventions, oblations and mortuaries, no prohibition ſhall lie; but it ſhall be otherwiſe in caſe of money for tithes; for then they are chattels.

By the ſtatute 18 *Ed.* 3. *ſt.* 3. *cap.* 7. Whereas writs of *ſcire facias* have been granted to warn prelates, religious, and other clerks, to anſwer *diſmes* in our Chancery, and to ſhew if they have any thing, or can any thing ſay, wherefore ſuch *diſmes* ought not to be reſtored to the ſaid demandants, and to anſwer as well to us as to the party, to ſuch *diſmes*; ſuch writs from henceforth ſhall not be granted, and the proceſs hanging upon ſuch writs ſhall be annulled and repealed, and the parties diſmiſſed from the ſecular judges of ſuch manner of pleas.

Writs of ſcire facias.] This is a writ where one hath recovered debts or damages in the king's courts, and ſueth not for execution within a year and a day; after which he ſhall have this writ, to warn the party; who coming not or ſaying nothing to ſtay execution, a writ of *fieri facias* goes, commanding the ſheriff to levy the debts or damages of his goods. *Terms of the law.*

To warn Prelates, religious and other clerks.] This *ſcire facias* was not brought againſt the poſſeſſors of the land for ſubtraction of tithes, but

againſt the prelates or other clerks, which took the tithes after they were ſevered. Commiſſions out of the Chancery were directed to certain perſons giving them authority to inquire whether ſuch a ſpiritual perſon ought to have tithes of ſuch lands; whereupon inquiſitions were taken and returned: And if it where found for the ſpiritual perſon, upon this record, he might have a *ſcire facias* againſt any prelate, religious, or other clerk, that took them after ſeverance. 2 *Inſt.* 640.

Eccleſiaſtical judges, in cauſes of tithes, being compelled by the ſecular power to obligations to deſiſt; all ſuch obligations ſhall be void, and the procurers puniſhed.

By the ſtatute 1 *R.* 2. *c.* 13. "The prelates and "clergy of this realm do greatly complain them, "for that the people of holy church, purſuing in "the ſpiritual court for their tithes and their "other things, which of right ought, and of old "times were wont to pertain to the ſame ſpiritual "court; and that the judges of holy church, "having cognizance in ſuch cauſes, and other "perſons thereof meddling according to the law, "be maliciouſly and unduly for this cauſe indicted, "impriſoned, and by ſecular power horribly op-"preſſed, and alſo inforced with violence, by "oaths and grievous obligations, and many "other means unduly compelled to deſiſt and "ceaſe utterly of the things aforeſaid, againſt the "liberties and franchiſes of holy church: Where-"fore it is aſſented, that all ſuch obligations made "or to be made by dureſs or violence, ſhall be of "no value. And as to thoſe that by malice do "procure ſuch indictments, and to be the ſame "indictors, after the ſame indictees be ſo acquit-"ted; ſuch procurers ſhall ſuffer a year's impri-"ſonment, and reſtore to the parties their da-"mages, and ſhall nevertheleſs make a grievous "fine unto the king. And the juſtices of aſſize, "or other juſtices, before whom ſuch indictees "ſhall be acquit, ſhall have power to inquire of "ſuch procurers and indictees, and duly to puniſh "them according to their deſert."

By

By the ſtatute 1 *R.* 2. *c.* 14. "At what time "that any perſon of the holy church be drawn in "plea in the ſecular court for his own tithes taken "by the name of goods taken away; and he "which is ſo drawn in plea maketh an exception, "or alledgeth, that the ſubſtance and ſuit of the "buſineſs is only upon tithes due of right, and of "poſſeſſion to his church or other his benefice: "In ſuch caſe the general averment ſhall not be "taken, without ſhewing ſpecially how the ſame "was his lay chattel."

By the 27 *H.* 8. *c.* 20. When by the noiſe of the diſſolution of monaſteries in this parliament, laymen took occaſion, upon trifling pretences to withdraw their tithes, it was enacted as followeth: "Foraſmuch as divers evil diſpoſed perſons, in- "habited in ſundry counties, cities, towns and "places of this realm, having no reſpect to their "duties to Almighty God, but againſt right and "good conſcience, having attempted to ſubtract "and withhold in ſome places the whole, and in "ſome places great part of their tithes and obla- "tions, as well perſonal as *predial*, due unto God "and Holy church; and purſuing ſuch their de- "teſtable enormities and injuries, have attempted "in late time paſt to diſobey and contemn the "proceſs, laws and decrees of the eccleſiaſtical "courts of this realm, in more temerarious and "large manner than before this time hath been "ſeen: For reformation of which ſaid injuries, "and for unity and peace to be preſerved amongſt "the king's ſubjects of this realm, our ſovereign "lord the king, being ſupreme head on earth "(under God) of the church of *England*, willing "the ſpiritual rights and duties of that church to "be preſerved, continued and maintained, hath "ordained and enacted by authority of this pre- "ſent parliament, that every of his ſubjects of "this realm, according to the eccleſiaſtical laws

Divers perſons withholding their tithes, in contempt of the eccleſiaſtical court, enacted, that every perſon ſhall pay tithes according to law and cuſtom.

and

" and ordinances of his church of *England*, and " after the laudable uſes and cuſtoms of the pa- " riſh or other place where he dwelleth or occu- " pieth, ſhall yield and pay his tithes and offer- " ings, and other duties of Holy church; and " that for ſuch ſubtractions of any the ſaid tithes " and offerings or other duties, the parſon, vi- " car, curate or other party in that behalf griev- " ed, may by due proceſs of the king's eccleſi- " aſtical laws of the church of *England*, convent " the perſon offending, before his ordinary, or " other competent judge of this realm, having " authority to hear and determine the right of " tithes, as alſo to compel the ſame perſon of- " fending to do and yield his duty in that behalf: " And in caſe the ordinary of the dioceſe or his " commiſſary, or the archdeacon or his official, " or any other competent judge aforeſaid, for " any contempt, contumacy, diſobedience or other " miſdemeanor of the party defendant, ſhall make " information and requeſt to any of the king's " moſt honourable council, or to the juſtices of " the peace of the ſhire where ſuch offender " dwelleth, to aſſiſt and aid the ſame ordinary, " commiſſary, archdeacon, official or judge, to " order or reform any ſuch perſon in any cauſe " before rehearſed; that then he of the king's " ſaid honourable council, or ſuch two juſtices " of the peace (whereof one to be of the *quorum*), " to whom ſuch information or requeſt ſhall be " made, ſhall have power to attach or cauſe to be " attached the perſon againſt whom ſuch infor- " mation or requeſt ſhall be made, and to commit " him to ward, there to remain without bail or " mainprize, until he ſhall have found ſufficient " ſurety to be bound by recognizance, or other- " wiſe before the king's ſaid counſellor or juſtice " of the peace, or any other like counſellor or " juſtice of the peace, to the uſe of our ſaid lord

Miniſters ſhall compel them by eccleſiaſtical laws;

And if any eccleſiaſtical judge be diſobeyed, the ſecular power ſhall aſſiſt him;

and commit the offender to ward, till he find ſurety, to obey the eccleſiaſtical court.

" the king, to give due obedience to the proceſs, " proceedings, decrees and ſentences of the ec- " cleſiaſtical court of this realm, wherein ſuch ſuit " or matter for the premiſſes ſhall depend or be; " and that every of the king's ſaid counſellors, or " two juſtices of the peace, whereof the one to be " of the *quarum* as is aforeſaid, ſhall have power " to take and record ſuch recognizance and obli- " gations."

This act not to extend to London.

Sect. 2. Provided, That this ſhall not extend to any inhabitant of the city of *London*, concerning any tithe, offering, or other eccleſiaſtical duty grown and due to be paid within the ſaid city; becauſe there is another order made for the payment of tithes and other duties within the ſaid city.

Parties to ſuch ſuit, may have all lawful defences and remedies.

Sect. 3. Provided alſo, That all perſons, being parties to any ſuch ſuit, may have their lawful action, demand or proſecution, appeals, prohibitions and all other their lawful defences and remedies in every ſuch ſuit, according to the ſaid eccleſiaſtical laws, and laws and ſtatutes of this realm, in as ample manner as they might have had if this act had not been made.

Sect. 1. *Shall have power to attach.*] *Sanchee* and others, quakers, were cited into the eccleſiaſtical court, to anſwer there upon their ſolemn affirmation, *&c.* concerning tithes withheld by them from the parſon of the pariſh, and for not anſwering, the commiſſary, according to the ſtatute of 27 *H.* 8. *cap.* 20. certifies their contumacy to two juſtices of peace by whoſe warrant they were ſeized, and committed to priſon; and being brought by *Habeas Corpus* into the King's Bench, Mr. *Robert Eyre* moved, that they might be diſcharged, becauſe the new act concerning the affirmation of quakers gives the parſon a remedy to recover tithes by diſtreſs by virtue of a warrant of a juſtice of peace; then where a ſtatute gives remedy, the juriſdiction

riſdiction of the ſpiritual court is taken away, unleſs it be ſaved by the ſame ſtatute. 5 *Co.* 73. *b. Jones* 320. And he cited ſeveral ſtatutes, where the juriſdiction of the ſpiritual court was ſaved, as 23 *Eliz. cap.* 1. 1 *Eliz. cap.* 2. In the ſame manner in the ſtatute againſt uſury, 3 *Inſt.* 152. 2 *Inſt.* 657. and from thence he inferred, that it was the opinion of thoſe parliaments, that the ſpiritual juriſdiction would have been taken away by theſe acts, if it had not been ſaved by them. But *per curiam*, This laſt act ſeems to be only an accumulative remedy, and not to repeal the act of *Hen.* 8. And in many caſes the Common law and eccleſiaſtical courts have a concurrent juriſdiction; as if a penſion be payable out of a parſonage, by preſcription, the remedy for this is either in the ſpiritual court, or annuity lies for it at Common law; tho' *Coke* ſays the contrary in his ſecond *Inſtitute* in his comment upon the ſtatute *de circumſpecte agatis*. But where the nature of the offence is altered by a ſtatute, and a new penalty inflicted; then after the party has been tried at Common law, and condemned, the eccleſiaſtical court ſhall not proceed againſt him. As if a man be convict at Common law for having two wives, or hath been adjudged the reputed father of a baſtard ſon, *&c.*

But then *Northey* took exception to the return, becauſe it is ſaid, that *Sanchee, &c.* were impriſoned for contempt in a ſuit for detention of tithes or other eccleſiaſtical duties; and it ought to appear, for which the ſuit was, ſpecially. For though the ſtatute that gives this remedy is in general words, yet in the return the cauſe of impriſonment ought to be certainly expreſſed, to the end that it may appear to the court, that it was an eccleſiaſtical duty, for which they are impriſoned. And of this opinion was the whole court, and therefore the quakers were diſcharged out of cuſtody. Ld. *Raym.* 323. *Hil.* 9 *Wil.* 3.

By

By the ſtatute 32 *H. 8. c. 7. ſect.* 1, 2, (which was alſo made upon occaſion of the diſſolution of monaſteries, and which was chiefly intended to enable laymen, that, by the diſſolution, had eſtates or intereſts in parſonages, or vicarages impropriate, or otherwiſe, in tithes, to ſue for ſubtraction of tithes in the eccleſiaſtical courts,) it is enacted as followeth: "Where divers perſons inhabiting in "ſundry countries and places of this realm, not "regarding their duties to Almighty God and to "the king our ſovereign lord, but in few years "paſt more contemptuouſly and commonly pre-"ſuming to offend and infringe the good and "wholeſome laws of this realm, and gracious com-"mandments of our ſovereign lord, than in times "paſt hath been ſeen or known, have not letted to "ſubtract and withdraw the lawful and accuſtomed "tithes of corn, hay, paſturages and other ſort of "tithes and oblations, commonly due to the ow-"ners, proprietaries and poſſeſſors of the parſo-"nages, vicarages and other eccleſiaſtical places "within this realm; being the more encouraged "thereto, for that divers of the king's ſubjects, "being lay perſons, having parſonages, vicarages "and tithes to them and their heirs, or to the "heirs of their bodies, or for term of life or "years, cannot by the order and courſe of the ec-"cleſiaſtical laws of this realm, ſue in any eccle-"ſiaſtical court for the wrongful withholding and "detaining of the ſaid tithes or other duties, nor "can by the order of the Common laws of this "realm have any due remedy againſt any perſon, "his heirs or aſſigns, that wrongfully detaineth or "withholdeth the ſame; by occaſion whereof "much controverſy, ſuit and variance is like to "enſue among the king's ſubjects, to the great "damage and decay of many of them, if con-"venient and ſpeedy remedy be not provided: "It is therefore enacted, that all perſons of this "realm,

Contempt of eccleſiaſtical laws among the people;

and particularly in the ſubtraction of tithes;

for the recovery of which lay impropriators have not remedy in eccleſiaſtical courts, or at Common law.

Every perſon ſhall pay tithe according to the lawful uſage of the parish.

" realm, of what eſtate, degree or condition ſoever
" they be, ſhall fully, truly and effectually divide,
" ſet out, yield, or pay all and ſingular tithes and
" offerings aforeſaid, according to the lawful cuſ-
" toms and uſages of pariſhes and places, where
" ſuch tithes or duties ſhall ariſe or become due;
" and if any perſon of his ungodly and perverſe
" will, ſhall detain and withhold any of the ſaid
" tithes or offerings, or any part thereof, then
" the perſon or perſons, being eccleſiaſtical or
" lay, having cauſe to demand the ſaid tithes or
" offerings, being thereby wronged or grieved,
" ſhall and may convent the perſon ſo offending,
" before the ordinary, his commiſſary, or other
" competent miniſter or lawful judge of the place
" where ſuch wrong ſhall be done, according to the
" eccleſiaſtical laws; and in every ſuch cauſe or
" matter of ſuit, the ſame ordinary or other judge,
" having the parties or their lawful procurators be-
" fore him, ſhall proceed to the examination,
" hearing and determination of every ſuch cauſe
" or matter, ordinarily or ſummarily, according
" to the courſe and proceſs of the ſaid eccle-
" ſiaſtical laws; and thereupon give ſentence ac-
" cordingly."

Upon any appeal from the ſentence of the ſpiritual court, coſts ſhall be adjudged againſt the appellant, &c.

" *Sect.* 3. And if any of the parties ſhall appeal
" from the ſentence, order, and definitive judg-
" ment of the ſaid ordinary or other competent
" judge as aforeſaid; then the ſame judge ſhall,
" upon ſuch appellation made, adjudge to the
" other party the reaſonable coſts of his ſuit
" therein before expended; and ſhall compel the
" ſame party appellant to ſatisfy and pay the
" ſame coſts ſo adjudged, by compulſory proceſs
" and cenſures of the ſaid laws eccleſiaſtical; ta-
" king ſurety of the other party to whom ſuch coſts
" ſhall be adjudged and paid, to reſtore the ſame
" coſts to the party appellant, if afterwards the
" principal cauſe of that ſuit of appeal ſhall be

" ad-

" adjudged againſt the ſame party to whom the " ſame coſts ſhall be yielded: And ſo every ordi- " nary or other competent judge eccleſiaſtical " ſhall adjudge coſts to the other party, upon " every appeal to be made in any ſuit or cauſe " of ſubtraction or detention of any tithes or of- " ferings, or in any other ſuit to be made con- " cerning the duty of ſuch tithes or offerings."

" *Sect.* 4. And if any perſon, after ſuch ſentence " definitive given againſt him, ſhall obſtinately " and wilfully refuſe to pay his tithes or duties, " or ſuch ſums of money ſo adjudged, wherein " he ſhall be condemned for the ſame; it ſhall be " lawful for two juſtices of the peace for the ſame " ſhire, whereof one to be of the *quorum*, upon " information, certificate or complaint to them " made in writing by the ſaid eccleſiaſtical judge " that gave the ſame ſentence, to cauſe the ſame " party ſo refuſing, to be attached and committed " to the next gaol, and there to remain, without " bail or mainprize, till he ſhall have found ſuf- " ficient ſureties, to be bound by recognizance or " otherwiſe, before the ſame juſtices, to the uſe " of our lord the king, to perform the ſaid defini- " tive ſentence and judgment."

Any perſon refuſing to pay tithe, after a definitive ſentence, ſhall be committed to gaol, till he obey the ſentence.

Sect. 5. Provided, That no perſon ſhall be ſued or otherwiſe compelled to pay any tithes, for any manors, lands, tenements or other hereditaments, which by the laws or ſtatutes of this realm are diſcharged, or not chargeable with the payment of any ſuch tithes.

Proviſo, for lands diſcharged.

Sect. 6. " Provided alſo, That this ſhall not in " any wiſe bind the inhabitants of the city of " *London*, and ſuburbs of the ſame, to pay their " tithes and offerings within the ſame city and ſub- " urbs, otherwiſe than they ought to have done " before."

Sect.

Lay impropriators ſhall have remedy for recovering eccleſiaſtical eſtates in the temporal courts, by writs original, &c.

Sect. 7. And in all caſes where any perſon ſhall have any eſtate of inheritance, freehold, term, right or intereſt in any parſonage, vicarage, portion, penſion, tithes, oblations, or other eccleſiaſtical or ſpiritual profits, which ſhall be made temporal, or admitted to be in temporal hands, and lay uſes and profits by the laws or ſtatutes of this realm, ſhall be diſſeiſed, deforced, wronged, or otherwiſe kept or put from their lawful inheritance, eſtate, ſeiſin, poſſeſſion, occupation, term, right or intereſt therein, by any other perſon claiming to have intereſt in, or title to the ſame; the perſon ſo diſſeiſed, deforced, or wrongfully kept or put out, his heirs, his wife and ſuch other to whom ſuch injury and wrong ſhall be done, may have their remedy in the king's temporal courts, or other temporal courts, as the caſe ſhall require, for the recovery or obtaining of the ſame, by writs original of *præcipe quod reddat*, aſſize of *novel diſſeiſin*, *mortdanceſtor*, *quod ei deforceat*, writs of dower, or other writs original, as the caſe ſhall require, to be deviſed and granted in the king's court of Chancery, in like manner and form as they might have had for lands, tenements or other hereditaments, in ſuch manner to be demanded: And writs of covenant and other writs for fines to be levied, and all other aſſurances to be had of the ſame, ſhall be granted in the ſaid Chancery, according as hath been uſed for fines to be levied and aſſurance to be had of lands, tenements or other hereditaments.

But actions for not ſetting out tithes, or detaining of them, ſhall be in the ſpiritual court.

Sect. 8. Provided, That this ſhall not give any remedy, cauſe of action or ſuit, in the courts temporal, againſt any perſon who ſhall refuſe to ſet out his tithes, or ſhall withhold or refuſe to pay his tithes or offerings; but that in all ſuch caſes, the party, being eccleſiaſtical or lay, having cauſe to demand, or have the ſaid tithes or offerings, and thereby wronged or grieved, ſhall have his remedy for

for the ſame, in the ſpiritual courts according to the ordinance in the firſt part of this act mentioned, and not otherwiſe.

By the ſtat. 2 & 3 *Ed.* 6. *c.* 13. the aforeſaid acts of the 27 *H.* 8. *c.* 20. and the 32 *H.* 8. *c.* 7. ſhall ſtand in full force: And moreover, it is further enacted, as followeth, *viz. ſect.* 1. "All perſons ſhall truly and juſtly, without fraud or guile, "divide, ſet out, yield and pay all manner of the "predial tithes, in their proper kind, as they riſe "and happen, in ſuch manner and form as hath "been of right yielded and paid within forty years "next before the making of this act, or of right "or cuſtom ought to have been paid; and no "perſon ſhall take or carry away any ſuch or like "tithes, which have been yielded or paid within "the ſaid forty years, or of right ought to have "been paid, in the place or places tithable of the "ſame, before he hath juſtly divided or ſet forth "the tithe thereof, the tenth part of the ſame, or "otherwiſe agreed for the ſame tithes with the par-"ſon, vicar, or other owner, proprietary, or far-"mer of the ſame tithes; under the pain of for-"feiture of treble value of the tithes ſo taken or "carried away." Recovery of treble value in the temporal courts, By 2 & 3 Ed. 6. c. 13.

Sect. 2. "At all times whenſoever, and as often "as any predial tithes ſhall be due at the tithing of "the ſame, it ſhall be lawful to every party to "whom any of the ſaid tithes ought to be paid, or "his deputy, or ſervant, to view and ſee their ſaid "tithes to be juſtly and truly ſet forth and ſevered "from the nine parts; and the ſame quietly to "take and carry away: And if any perſon carry "away his corn or hay, or his other predial tithes, "before the tithe thereof be ſet forth; or willingly "withdraw his tithes of the ſame, or of ſuch other "things whereof predial tithes ought to be paid; "or do ſtop or let the parſon, vicar, proprietor, "owner, or other their deputies or farmers, to

" view, take and carry away their tithes as is " aboveſaid; by reaſon whereof the ſaid tithe " or tenth is loſt, impaired or hurt: Then, upon " due proof thereof made before the ſpiritual " judge, or any other judge to whom heretofore " he might have made complaint, the party ſo " carrying away, withdrawing, letting or ſtopping, " ſhall pay the double value of the tenth or tithe " ſo taken, loſt, withdrawn or carried away, over " and beſides the coſts, charges and expences of " the ſuit, in the ſame: The ſame to be recovered " before the eccleſiaſtical judge, according to the " king's eccleſiaſtical laws."

Sect. 4. " Provided, That no perſon ſhall be ſued " or otherwiſe compelled to yield, give or pay any " manner of tithes, for any manors, lands, tene- " ments or hereditaments, which by the laws and " ſtatutes of this realm, or by any privilege or pre- " ſcription, are not chargeable with the payment " of any ſuch tithes, or that be diſcharged by any " compoſition real.

Sect. 13. " And if any perſon do ſubtract or " withdraw any manner of tithes, obventions, pro- " fits, commodities, or other duties (before men- " tioned,) or any part of them, contrary to the " true meaning of this act, or of any other act " heretofore made; the party ſo ſubtracting or " withdrawing the ſame, may be convented and " ſued in the king's eccleſiaſtical court, by the " party from whom the ſame ſhall be ſubtracted " or withdrawn; to the intent the king's eccle- " ſiaſtical judge may hear and determine the ſame, " according to the king's eccleſiaſtical laws: And " it ſhall not be lawful to the parſon, vicar, pro- " prietor, owner, or other their farmers or depu- " ties, contrary to this act, to convent or ſue ſuch " withholder of tithes, obventions and other du- " ties aforeſaid, before any other judge than ec- " cleſiaſtical. And if any archbiſhop, biſhop,

" chan-

" chancellor, or other judge eccleſiaſtical, give " any ſentence in the aforeſaid cauſes of tithes, " obventions, profits, emoluments, and other " duties aforeſaid, or in any of them, (and no " appeal or prohibition hanging) and the party con- " demned do not obey the ſaid ſentence; it ſhall " be lawful to every ſuch judge eccleſiaſtical, to " excommunicate the ſaid party ſo as aforeſaid " condemned and diſobeying: In which ſentence " of excommunication, if the ſaid party excom- " municate, wilfully ſtand and endure ſtill excom- " municate, by the ſpace of forty days next after, " upon denunciation and publication thereof in " the pariſh church, or the place or pariſh where " the party ſo excommunicated is dwelling or moſt " abiding; the ſaid judge eccleſiaſtical may then, " at his pleaſure, ſignify to the king in his court " of Chancery, of the ſtate and condition of the " ſaid party ſo excommunicate, and thereupon re- " quire proceſs *de excommunicato capiendo*, to be " awarded againſt every ſuch perſon as hath been " ſo excommunicate."

Sect. 14. " And if the party in ſuch caſe ſhall " ſue for a prohibition, he ſhall, before any pro- " hibition granted, deliver to ſome of the juſtices " or judges of the court where he demandeth pro- " hibition, a true copy of the libel, ſubſcribed by " his hand; and under the copy of the ſaid libel " ſhall be written the ſuggeſtion wherefore he de- " mandeth the prohibition: And in caſe the ſaid " ſuggeſtion, by two honeſt and ſufficient witneſſes " at leaſt, be not proved true in the court where " the ſaid prohibition ſhall be ſo granted, within " ſix months next following, after the ſaid prohi- " bition ſhall be ſo granted and awarded; then the " party that is letted or hindred of his ſuit in the " eccleſiaſtical court, by ſuch prohibition, ſhall " upon his requeſt and ſuit, without delay, have a " conſultation granted by the ſame court; and

" ſhall alſo recover double coſts and damages, " againſt the party that ſo purſued the prohibition, " to be aſſigned or aſſeſſed by the ſame court; for " which coſts and damages the party may have an " action of debt.

Sect. 15. " Provided, That nothing herein ſhall " extend to give any miniſter or judge eccleſiaſti- " cal, any juriſdiction to hold plea of any matter, " cauſe or thing, contrary to the ſtatute of *Weſtmin- " ſter* 2. *c.* 5. the ſtatutes of *Articuli cleri*, *Circum- " ſpecte agatis*, *Sylva Cædua*, the treatiſe *de regia " prohibitione*, nor againſt the ſtatute of 1 *Ed.* 3. " *c.* 10. nor to hold plea in any matter, whereof the " king's court of right ought to have juriſdiction."

Truly and juſtly without fraud or guile] See *ſect.* 1, of the preceding ſtatute. In the caſe of *Heale* and *Sprat*, *T.* 44 *Eliz.* in a prohibition, the caſe was, *Heale* did ſet out his predial tithes, and divided them juſtly from the nine parts, and ſoon after carried away the ſame. *Sprat* ſued for a ſubtraction of the ſame in the eccleſiaſtical court. *Heale* pleaded that he had ſet them out, as above: Whereunto *Sprat* ſaid, that preſently after his ſetting out, he carried the ſame away, to the defrauding of the ſtatute: And it was adjudged, that this was fraud and guile within this act; albeit he did juſtly divide the ſame within the letter of this law. It was further reſolved, that if the owner of the corn before ſeverance, grant the ſame to another, of intent that the grantee ſhould take away the ſame, to the end to defraud the parſon of his tithe; this is fraud and guile within this ſtatute. 2 *Inſt.* 649.

Predial tithes] This branch extends only to predial tithes: Thus, in the caſe of *Booth* and *Southraie*, *E.* 1 *Ja.* in debt upon this ſtatute, by the parſon of the church, for not ſetting forth of the tithes of cheeſe, calves, lambs, cherries and pears, to have the treble value; the defendant pleaded *nihil debet*, and it was found againſt him: and it was moved in arreſt

arreſt of judgment, that the ſaid tithes of cheeſe, or calves and lambs, were not predial tithes, and therefore not within this branch of the ſtatute; and this act is penal, and ſhall not be taken by equity; which was allowed by the whole court. 2 *Inſt.* 649.

Within forty years next before the making of this act] This time of forty years is here ſet down, becauſe forty years in the eccleſiaſtical court about tithes, make a preſcription. 2 *Inſt.* 649. 1 *Ought.* 263.

Or of right or cuſtom ought to have been paid] The ſenſe of theſe words *of right ought to have been paid*, is of tithes to be yielded in ſpecie within forty years; and the ſenſe of the words *of right or cuſtom*, is, by rightful cuſtom, *de modo decimandi.* 2 *Inſt.* 650.

Under the pain of forfeiture of treble value of the tithes ſo taken, or carried away] This branch doth not give the forfeiture to any perſon in certain; and therefore it was pretended, that the forfeiture ſhould be given to the king: and thereupon the attorney general, *Hil.* 29 *Eliz.* did exhibit an information in the Exchequer, againſt one *Wood*, a pariſhioner of *Jelington* in the county of *Cambridge*, for this treble forfeiture, for carrying away his tithes before they were juſtly divided. The defendant pleaded Not guilty; and by a jury at the bar he was found guilty; and in arreſt of judgment it was moved, that in this caſe the forfeiture was not given to the king, for that the words of the act be, *under the pain of forfeiture of treble value of the tithes ſo taken away*: And whenſoever a forfeiture is given againſt him, that doth diſpoſſeſs the owner of his property, as here he doth of his tithes, there the forfeiture is given to the party grieved or diſpoſſeſſed; and the rather, for that this is an additional law, and made for the benefit of the proprietor of the tithes; and ſo it was adjudged by

Manwood and the whole court of Exchequer; and this was the firſt leading caſe that was adjudged upon this point; and ever ſince, it hath been received for law, that the party intereſted in the tithes ſhall in an action of debt recover the treble value. 1 *Inſt.* 159. 2 *Inſt.* 650.

And it is to be obſerved, that the treble value only, and not the tithes themſelves, nor any ſatisfaction for them, may be recovered in the temporal court: That being out of the juriſdiction of thoſe courts, and wholly in the ſpiritual court; which is the reaſon why in all ſuits upon this ſtatute, the action is not laid for ſubtraction of tithes, but for a contempt of the ſtatute, in not ſetting them out; and being a contempt, the action dies with him who committed the contempt; and doth not lie againſt his executor. *Gibſ.* 697. 1 *Vern.* 60.

And it hath been held, that an action grounded on this ſtatute for not ſetting forth of tithes, is not within the ſtatute of limitations; that ſtatute not extending to actions grounded on acts of parliament; therefore the plaintiff is not by law confined to ſix years, or to any other time certain, within which to bring his action. *Watſ.* c. 58.

Thus in the caſe of *Marſton* and *Cleypole*, *E.* 1726, on a bill by a lay impropriator, for tithes in the court of Exchequer, for about twenty-four years; the defendant, as to ſuch part of the bill as prayed diſcovery and relief, for any time before, within ſix years next before filing the bill, or ſerving the *ſubpœna*, pleaded the ſtatute of limitations, and that he did not promiſe to make any ſatisfaction for any tithes before the ſaid ſix years; but it was over-ruled by the court: becauſe the defendant, as to tithes, is only in the nature of a receiver or bailiff for the plaintiff; in which caſe the ſtatute of limitations doth not operate. *Bunb.* 213.

If

If a jury give a verdict for the plaintiff, they muſt find the real value of the tithes, which ſhall be trebled by the court; as, if the jury find the real and ſingle value to be twenty pounds, they ought to give the plaintiff only ſo much, and the court ſhall treble it, and make that ſum given by the jury to be ſixty pounds, which is treble the value: but if the iſſue be upon the cuſtom of tithing, or any other collateral point, the jury need not to find any value of the tithes; for that in ſuch caſe the defendant ſhall pay the value expreſſed by the plaintiff in his declaration; becauſe, by the collateral matter pleaded in bar, the value of the tithes ſet forth in the declaration is confeſſed. Therefore, in all actions brought upon this ſtatute, if the defendant plead any collateral matter in bar of the action, he muſt take the value of the tithes mentioned in the declaration by proteſtation; that is, he muſt, by the form of a proteſtation, aver, that the tithes were not of that value as is declared, otherwiſe he will be charged with the value the plaintiff hath by his declaration ſet upon them. And the ſame law is ſaid to be, if judgment be given for the plaintiff by *nihil dicit*, *non ſum informatus*, or upon demurrer. *Watſ. c.* 58.

Reſolved, that this ſtatute, which gives treble damages, does not allow the jury to give other damages: No coſts being given by the ſtatute, the jury can aſſeſs no coſts. *Mo.* 915.

And neither damages nor coſts can be recovered with the treble value; becauſe the ſtatute hath not expreſly given them, except that by the ſtatute of the 8 & 9 *W. c.* 11. it is enacted, That in all actions of debt upon the ſtatute for not ſetting forth of tithes, wherein the ſingle value or damage found by the jury, ſhall not exceed the ſum of twenty nobles; the plaintiff obtaining judgment, or any award of execution after plea pleaded or demurrer joined therein, ſhall recover his coſts of

ſuit; and if the plaintiff ſhall become nonſuit, or ſuffer a diſcontinuance, or a verdict ſhall paſs againſt him, the defendant ſhall recover his coſts.

In debt upon ſtatute 2 *Ed.* 6. of tithes, the plaintiff in his declaration demanded more than the treble value did amount unto, and did not ſhew ſatisfaction for the reſt; but all the court held it good enough, for there is a difference when an action is grounded upon a ſpecialty or a contract which is a certain ſum, or upon a ſtatute which gives a certain ſum for the penalty, for there he may not vary from the ſpecialty. But when the demand is of no ſum certain, but only ſo much as ſhall be given by a jury, although he varies from the firſt valuation it is not material, for he ſhall not recover according to his demand in his declaration, but according to the verdict; judgment for the plaintiff. *Cro. Jac.* 498. *pl.* 6. *Trin.* 16 *Jac. B. R. Pemberton* v. *Shelton.*

Debt upon the ſtatute for not ſetting forth tithes; after verdict it was moved that the declaration was too general and uncertain, it being for ſuch a quantity of grain; but did not ſhew what ſort of grain; and ſo it may be for grain not tithable, for the words grain comprehends rape-ſeed, cole-ſeed, *&c.* there is a very good authority that it comprehends muſtard-ſeed. But adjudged, that the declaration was good, for it was for grain growing in ſuch a field; and the word grain in common underſtanding is taken for corn. *Style* 103, 108. *Trin.* 24 *Car. B. R. Southcott* v. *Southcott.* In debt upon the ſtatute 2 *Ed.* 6. for tithes, the plaintiff declared, that he was rector of *M. A.* and by reaſon thereof ought to have the tithes of 100 acres of land in that pariſh, and of 80 acres of land in the pariſh of *M. G.* without ſhewing how he was intitled to the tithes of the lands out of his pariſh. The court held this to be well enough after a verdict; beſides that a general allegation

legation without ſhewing a title is well enough in this action. Another exception was, that the plaintiff did not alledge that the defendant was *Subditus domini Regis*, as the ſtatute requires; *Sed non allocatur*, becauſe it is alledged, that he was *Occupator Terræ*, which implies that he was *Subditus*. *Hardr.* 173. *Mich.* 12 *Car.* 2. *in Scacc. Phillips* v. *Kettle.*

In an action of debt upon the ſtatute 2 *Ed.* 6. of tithes, wherein the plaintiff demanded the treble value, *&c.* upon *Nil debet* pleaded the plaintiff had a verdict in *C. B.* and upon a writ of error brought in *B. R.* it was very much inſiſted on that the declaration was ill, becauſe the plaintiff had only alledged that the defendant had carried away the corn without ſetting out the tithes, but did not aver that the defendant had not made any agreement with them for the tithes; for the ſtatute gives the penalty where the tithes are carried off without any agreement made for ſo doing; therefore if the defendant had agreed with the plaintiff for carrying off the corn without ſetting out the tithes, (as it does not appear but he might) then it had been no forfeiture; and the court was of that opinion, *viz.* that the declaration was ill for the reaſon *ſupra*, if it had been upon a demurrer; but this was helped by the verdict; for if there had been any agreement proved at the trial, the plaintiff could not have obtained a verdict. *Carth.* 304. *Paſch.* 6 *W. & M.* in *B. R. Alſton & al'* v. *Buſcough.*

Shall pay the double value] See *ſect.* 2. The reaſon why only the double value is, by this branch, to be recovered in the eccleſiaſtical court, where, by the former branch, the parſon, at the Common law, ſhall recover the treble, is, for that in the eccleſiaſtical court he ſhall recover the tithes themſelves; and therefore the value recovered in the

eccleſiaſtical court is equivalent with the treble forfeiture at the Common law. 2 *Inſt.* 650.

And the double value, together with the ſtatute, ought to be *expreſly* mentioned in the libel: but yet the libel muſt be ſo ordered, as not to be grounded directly upon the ſtatute for more than double value; for if the ſingle damages, that is, the value of the tithes, be alſo grounded upon it, this will be interpreted a ſuing in the ſpiritual court for the treble value; and a prohibition will lie. *Godb.* 245. *Gibſ.* 697.

Over and beſides the coſts, charges, and expences] So as the ſuit in the eccleſiaſtical court is more advantageous, than the ſuit for the treble forfeiture at the Common law. For at the Common law he ſhall recover no coſts; but he ſhall recover in the eccleſiaſtical court, his coſts, charges, and expences. 2 *Inſt.* 651.

May be convented] See *ſect.* 13. In the caſe of *Machin* and *Molton*, *Eaſt.* 11 *W.* 3. it was moved for the diſcharge of a rule, by which a prohibition was granted, unleſs cauſe ſhewed, to the conſiſtory court of the archbiſhop of *York*; where *Molton*, rector of the church of *South Collingham* in the dioceſe of *York*, preferred a libel againſt *Machin*, for ſubtraction of tithes; and the motion for the prohibition was grounded upon a ſuggeſtion, that *Machin* lived within the dioceſe of *Lincoln*, and therefore ought not to be cited out of the dioceſe where he lived, by the 23 *H.* 8. *c.* 9. And the cauſe which was ſhewed to the court to diſcharge the rule was, becauſe *Machin* had lands within the dioceſe of *York*, namely, in the pariſh of *South Collingham*; for the tithes of corn growing upon which lands *Molton* libelled in the conſiſtory court of *York*; and when the citation was ſerved, *Machin* was there, though he lived generally within the dioceſe of *Lincoln*. And by *Holt* Chief Juſtice; If a man lives within the dioceſe of *A.* and occupies

occupies lands in the dioceſe of *B.* if he ſubtracts tithes in *B.* he may be cited and ſued there; and it is not within the ſaid ſtatute: for when he occupies lands in *B.* that makes him an inhabitant there, and out of the intent of the ſtatute; and by the ſtatute of the 32 *H.* 8. *c.* 7. *ſect.* 2. the ſuit for withholding of tithes in expreſs words is appointed to be, before the ordinary of the place where the wrong was done. *L. Raym.* 452, 534.

By two honeſt and ſufficient witneſſes at leaſt] See *Sect.* 14. This clauſe was made in favour of the clergy, for proof to be made by witneſſes; which they had not at the Common law. But if the ſuggeſtion be in the negative, as, if the proprietary of a parſonage impropriate ſue for tithes, and the cauſe of the ſuggeſtion be, that the parſonage is not impropriate; or if a parſon ſue for tithes of lands in his pariſh, and the party ſue for a prohibition, for that the land lieth not in that pariſh, or that the parſon that ſueth for tithes was not inducted; or any the like cauſe, in the negative of any matter of fact, he ſhall not produce any witneſſes by force of this branch, becauſe a negative cannot be proved: and therefore a prohibition upon cauſes in the negative remains as it was at the Common law. 2 *Inſt.* 662.

Proved true] It is ſufficient in this caſe, that enough is proved, upon which to ground a prohibition, though the ſuggeſtion be not ſhewn to be ſtrictly and wholly true. So, where the ſuggeſtion was for twenty acres of paſture, and as many acres of wood in lieu of tithes, and proof was only made of the wood; or where the ſuggeſtion was for wool and lamb, and the witneſſes only proved as to the lamb; or for a hundred acres, when there were only ſixty; or for twenty ſhillings by way of *Modus*, where the ſum was forty ſhillings; in theſe caſes, the proofs were adjudged to be ſufficient, becauſe enough was proved to ſhew, that the

the court chriſtian ought not to hold plea thereof. But if proof is neither made of the *Modus* laid, nor of any other *Modus*; then the ſuggeſtion is not proved. *Gibſ.* 699.

As to the clearneſs of the evidence, it is ſufficient in this caſe, if the witneſſes do declare as to the matter of the ſuggeſtion, that they believe it, or have known it ſo, or have heard it, or that there is a common fame of it. *Gibſ.* 699.

Within ſix months] If there is no certainty in the firſt proof, it cannot be ſupplied by good proof after the ſix months; but if good proof is made within the time, it may be certified after the time. *Gibſ.* 700.

Six months] That is, ſix kalendar months; and not to be reckoned by twenty-eight days to the month. 2 *Salk.* 554.

Six months next following] Which muſt be computed from the *teſte* of the writ; and not ſix months in the term-time only, but the vacation ſhall be included as part of the time. 2 *Salk.* 554. *L. Raym.* 1172.

Have a conſultation granted] After which, the party may have a new prohibition upon the ſame libel; inaſmuch as the ſtatute of the 50 *Ed.* 3. againſt prohibition after conſultation, extends not to thoſe conſultations which are granted upon the matter of the ſuggeſtion. *Gibſ.* 700.

Contrary to the ſtatute of Weſtminſter the ſecond] Concerning the writ of *Indicavit*, given by that ſtatute. 2 *Inſt.* 663.

The ſtatutes of *Articuli cleri*, *Circumſpecte agatis*, *Sylva Cædua*] All which, with reſpect to tithes, are ſpecified in this title.

The treatiſe *de regiâ prohibitione*] Which is, that which is intitled *prohibitio formata ſuper articulis*. Act *Magn. Chart. part* 2. *fol.* 7. 2 *Inſt.* 663.

Nor

Not againſt the ſtatute of the 1 *Ed.* 3. *c.* 10.] This is miſprinted; for the act is 1 *Ed.* 3. *ſt.* 2. *c.* 11. that if any ſuit be in the ſpiritual court againſt indictors, a prohibition doth lie. 2 *Inſt.* 663.

By the Stat. 7 & 8 *W.* 3. *c.* 6. *ſect.* 6. For the more eaſy and effectual recovery of ſmall tithes, and the value of them, where the ſame ſhall be unduly ſubtracted and detained, where the ſame do not amount to above the yearly value of forty ſhillings from any one perſon; it is enacted, That all perſons ſhall well and truly ſet out and pay all and ſingular the tithes commonly called ſmall tithes, and compoſitions and agreements for the ſame, with all offerings, oblations, and obventions, to the ſeveral rectors, vicars, and other perſons to whom they ſhall be due in their ſeveral pariſhes, according to the rights, cuſtoms, and preſcriptions commonly uſed within the ſaid pariſhes reſpectively; and if any perſon ſhall ſubtract or withdraw, or any ways fail in the true payment of ſuch ſmall tithes, offerings, oblations, obventions, or compoſitions, by the ſpace of twenty days at moſt after demand thereof; it ſhall be lawful for the perſon to whom the ſame ſhall be due, to make his complaint in writing to two or more juſtices of the peace, within that county, place or diviſion where the ſame ſhall grow due, neither of which juſtices is to be patron of the church or chapel whence the ſaid tithes ſhall ariſe, nor any ways intereſted in ſuch tithes, offerings, oblations, obventions or compoſitions aforeſaid. Small tithes to be recovered before juſtices of the peace.

Sect. 2. And on ſuch complaint, the ſaid juſtices ſhall ſummon in writing under their hands and ſeals, by reaſonable warning, every ſuch perſon againſt whom ſuch complaint ſhall be made; and after his appearance, or upon default of appearance, the ſaid warning or ſummons being proved before them upon oath, the ſaid juſtices ſhall Juſtices to ſummon the party, &c.

ſhall proceed to hear and determine the ſaid complaint; and upon the proofs, evidences, and teſtimonies produced before them, ſhall in writing under their hands and ſeals adjudge the caſe, and give ſuch reaſonable allowance and compenſation for ſuch tithes, oblations and compoſitions ſo ſubtracted or withheld, as they ſhall judge to be juſt and reaſonable, and all ſuch coſts and charges, not exceeding ten ſhillings, as upon the merits of the cauſe ſhall appear juſt.

If the ſum adjudged be not paid in ten days, it ſhall be levied by diſtreſs.

Sect. 3. And if any perſon ſhall refuſe or neglect, for the ſpace of ten days after notice given, to pay or ſatisfy any ſuch ſum of money, as upon ſuch complaint and proceeding ſhall by two ſuch juſtices be adjudged as aforeſaid; in every ſuch caſe the conſtables and churchwardens of the ſaid pariſh, or one of them, ſhall, by warrant under the hands and ſeals of the ſaid juſtices to them directed, diſtrain the goods and chattels of the party ſo refuſing or neglecting as aforeſaid; and after detaining them [not leſs than four days, nor more than eight, by 27 *G.* 2. *c.* 20.] in caſe the ſaid ſum ſo adjudged, together with reaſonable charges of making and detaining the ſaid diſtreſs, be not tendered or paid by the ſaid party in the mean time, ſhall make publick ſale thereof, and pay to the party complaining ſo much of the money ariſing by ſuch ſale, as may ſatisfy the ſaid ſum ſo adjudged, retaining to themſelves ſuch reaſonable charges for making and keeping the ſaid diſtreſs as the ſaid juſtices ſhall think fit [and alſo deducting their reaſonable charges of ſelling the ſaid diſtreſs; returning the overplus (if any ſhall be) to the owner upon demand. 27 *G.* 2. *c.* 20.]

Sect. 4. And the ſaid juſtices ſhall have power to adminiſter an oath.

Proviſo for the city of *London*.

Sect. 5. Provided, that this act ſhall not extend to any tithes, oblations, payments, or obventions, within the city of *London* or liberties thereof; nor

to

to any other city or town corporate where the ſame are ſettled by act of parliament.

Sect. 6. And no complaint ſhall be heard and determined by the ſaid juſtices, unleſs the complaint ſhall be made within two years next after the time that the ſame tithes, oblations, obventions and compoſitions did become due. Complaints to be made in two years.

Sect. 7. Provided alſo, That any perſon finding himſelf aggrieved by any judgment to be given by ſuch two juſtices, may appeal to the next general quarter-ſeſſions to be held for that county or other diviſion; and the juſtices there ſhall proceed finally to hear and determine the matter; and to reverſe the ſaid judgment, if they ſhall ſee cauſe; and if they ſhall find cauſe to confirm the ſaid judgment, they ſhall decree the ſame by order of ſeſſions, and ſhall alſo proceed to give ſuch coſts againſt the appellant, to be levied by diſtreſs and ſale of the goods and chattels of the ſaid appellant, as to them ſhall ſeem juſt and reaſonable, and no proceedings or judgment had by virtue of this act, ſhall be removed or ſuperſeded by any writ of *certiorari*, or other writ out of his majeſty's courts at *Weſtminſter*, or any other court, unleſs the title of ſuch tithes, oblations or obventions ſhall be in queſtion. Appeal from the two juſtices to the quarter-ſeſſions.

Sect. 8. Provided, That where any perſon complained of for ſubtracting or withholding any ſmall tithes or other duties aforeſaid, ſhall, before the juſtices to whom ſuch complaint is made, inſiſt upon any preſcription, compoſition or *Modus decimandi*, agreement or title, whereby he ought to be freed from payment of the ſaid tithes or other dues in queſtion, and deliver the ſame in writing to the ſaid juſtices ſubſcribed by him; and ſhall then give to the party complaining, reaſonable and ſufficient ſecurity to the ſatisfaction of the ſaid juſtices, to pay all ſuch coſts and damages, as What to be done, if preſcription, compoſition or Modus be inſiſted on.

as upon a trial at law to be had for that purpoſe in any of his majeſty's courts, having cognizance of that matter, ſhall be given againſt him in caſe the ſaid preſcription, compoſition or *Modus decimandi*, ſhall not, upon the ſaid trial, be allowed; in that caſe, the ſaid juſtices ſhall forbear to give any judgment in the matter; and then and in ſuch caſe, the party complaining ſhall be at liberty to proſecute ſuch perſon for his ſaid ſubtraction, in any other court where he might have ſued before the making of this act.

Every judgment given by the juſtices ſhall be inrolled at the quarter-ſeſſions.

Sect. 9. And every perſon who ſhall by virtue of this act obtain any judgment, or againſt whom any judgment ſhall be obtained before any juſtices of the peace out of ſeſſions for ſmall tithes, oblations, obventions or compoſitions, ſhall cauſe or procure the ſaid judgment to be inrolled at the next general quarter-ſeſſions, to be held for the ſaid county or other diviſion; and the clerk of the peace ſhall upon tender thereof inrol the ſame, and ſhall not receive for the inrolment of any one judgment, any fee or reward exceeding one ſhilling; and the judgment ſo inrolled, and ſatisfaction made by paying the ſum adjudged, ſhall be a good bar to conclude the ſaid rectors, vicars and other perſons, from any other remedy for the ſaid ſmall tithes, oblations, obventions or compoſitions, for which the ſaid judgment was obtained.

Money adjudged may be levied in another county.

Sect. 10. And if any perſon againſt whom ſuch judgment ſhall be had, ſhall remove out of the county or other diviſion before the levying of the ſum adjudged; the juſtices who made the judgment, or one of them, ſhall certify the ſame, under hand and ſeal to any juſtice of ſuch other county or place wherein the ſaid perſon ſhall be an inhabitant; who ſhall by warrant under his hand and ſeal, to be directed to the conſtables or church-

wardens

wardens of the place, or one of them, levy the ſum ſo adjudged to be levied, upon the goods and chattels of ſuch perſon, as fully as the ſaid other juſtice might have done, if he had not removed as aforeſaid.

Juſtices may give coſts not exceeding 10 s. to the party proſecuted.

Sect. 12. And the juſtices who ſhall hear and determine any of the matters aforeſaid, ſhall have power to give coſts, not exceeding ten ſhillings, to the party proſecuted, if they ſhall find the complaint to be falſe and vexatious; to be levied in manner and form aforeſaid.

Sect. 13. And if any perſon ſhall be ſued for any thing done in the execution of this act, and the plaintiff in ſuch ſuit ſhall diſcontinue his action, or be nonſuit or a verdict paſs againſt him; ſuch perſon ſhall recover double coſts.

Sect. 14. Provided, That any clerk or other perſon, who ſhall begin any ſuit for recovery of ſmall tithes, oblations or obventions, not exceeding the value of forty ſhillings, in his majeſty's court of Exchequer, or in any the eccleſiaſtical courts, ſhall have no benefit by this act for the ſame matter for which he hath ſo ſued.

Complaint in writing.] See *ſect.* 1. of the foregoing ſtatute. Order for non-payment of ſmall tithes was quaſhed, becauſe ſaid only *upon complaint* generally, and the 7 & 8 *Wil.* 3. *c.* 6. requires the complaint to be in writing. *Stran.* 264.

Tithes of Quakers to be recovered before juſtices of the peace.

By the ſtat. 7 & 8 *W. c.* 34. Whereas by reaſon of a pretended ſcruple of conſcience, Quakers do refuſe to pay tithes and church-rates; It is enacted, That where any quaker ſhall refuſe to pay or compound for his great or ſmall tithes, or to pay any church-rates, it ſhall be lawful for the two next juſtices of the peace of the ſame county (other than ſuch juſtice as is patron of the church or chapel, whence the ſaid tithes ſhall ariſe, or any ways intereſted in the ſaid tithes,) upon the complaint of any parſon, vicar, farmer or proprietor

of tithes, churchwarden or churchwardens, who ought to have, receive or collect the ſame, by warrant under their hands and ſeals, to convene before them ſuch quaker or quakers neglecting or refuſing to pay or compound for the ſame, and to examine upon oath (or affirmation, in caſe of the examination of a quaker) the truth and juſtice of the ſaid complaint, and to aſcertain and ſtate what is due and payable; and by order under their hands and ſeals, to direct and appoint the payment thereof, ſo as the ſum ordered do not exceed ten pounds; and upon refuſal to pay according to ſuch order, it ſhall be lawful for any one of the ſaid juſtices, by warrant under his hand and ſeal, to levy the ſame by diſtreſs and ſale of the goods of ſuch offender, his executors or adminiſtrators, rendering only the overplus to him or them; the neceſſary charges of diſtraining being thereout firſt deducted and allowed by the ſaid juſtice. And any perſon finding himſelf aggrieved by any judgment given by ſuch two juſtices, may appeal to the next general quarter-ſeſſions to be held for the county, riding, city, liberty or town corporate; and the juſtices there ſhall proceed finally to hear and determine the matter, and to reverſe the ſaid judgment, if they ſee cauſe; and if they ſhall find cauſe to continue the ſaid judgment, they ſhall then decree the ſame by order of ſeſſions, and ſhall alſo proceed to give ſuch coſts againſt the appellant, to be levied by diſtreſs and ſale of the goods and chattels of the ſaid appellant, as to them ſhall ſeem juſt and reaſonable; and no proceedings or judgment had by virtue of this act, ſhall be removed or ſuperſeded by any writ of *certiorari* or other writ out of his majeſty's courts at *Weſtminſter*, or any other court whatſoever, unleſs the title of ſuch tithes ſhall be in queſtion.

Sect. 5. Provided, That in caſe any ſuch appeal be made as aforeſaid, no warrant of diſtreſs ſhall

ſhall be granted until after ſuch appeal be determined.

And by the ſtat. 1 *Geo.* 1. *ſt.* 2. *c.* 6. *ſect.* 2. The like remedy ſhall be had againſt any quaker or quakers, for the recovering of any tithes or rates, or any cuſtomary or other rights, dues or payments, belonging to any church or chapel, which of right by law and cuſtom ought to be paid, for the ſtipend or maintainance of any miniſter or curate officiating in church or chapel; and any two or more juſtices of the peace of the ſame county or place (other than ſuch juſtice as is patron of any ſuch church or chapel, or any ways intereſted in the ſaid tithes), upon complaint of any parſon, vicar, curate, farmer or proprietor of ſuch tithes, or any churchwarden or chapelwarden, or other perſon who ought to have, receive or collect any ſuch tithes, rates, dues or payments as aforeſaid, are authorized and required to ſummon, in writing under their hands and ſeals, by reaſonable warning, ſuch quaker or quakers, againſt whom ſuch complaint ſhall be made; and after his or their appearance, or upon default of appearance, the ſaid warning or ſummons being proved before them upon oath, to proceed to hear and determine the ſaid complaint; and to make ſuch order therein as in the aforeſaid act is limited; and alſo to order ſuch coſts and charges as they ſhall think reaſonable, not exceeding ten ſhillings, as upon the merits of the cauſe ſhall appear juſt; Which order ſhall and may be ſo executed, and on ſuch appeal may be reverſed or affirmed by the general quarter-ſeſſions, with ſuch coſts and remedy for the ſame; and ſhall not be removed into any other court, unleſs the titles of ſuch tithes, dues or payments ſhall be in queſtion; in like manner as by the aforeſaid act is limited and provided.

And by the ſtat. 27 *Geo.* 2. *c.* 20. which directs in what manner diſtreſſes ſhall be made by juſtices of the peace, and which gives to the juſtices power to order the goods diſtrained to be kept for a certain time before they be ſold, and gives power alſo to the officers making the diſtreſs to deduct their reaſonable charges, it is provided, That the ſame ſhall not extend to alter any proviſions relating to diſtreſſes to be made for the payment of tithes and church-rates by the people called Quakers, contained in the acts of the 7 & 8 *W.* *c.* 34. and the 1 *Geo.* *ſt.* 2. *c.* 6.

In the caſe of the king againſt *Roger Wakefield* and others, *Hil.* 31 *G.* 2. An order of two juſtices was made againſt three perſons, being quakers, on the 1 *Geo.* 1. *ſt.* 2. *c.* 6. for the payment of certain cuſtomary payments, called *Chapel ſalary*, to the reverend Mr. *Smith*, curate of the chapel of *Burniſide* in *Weſtmorland*, where the ſaid quakers had eſtates chargeable with the ſaid payments. On appeal to the ſeſſions, the order was confirmed. The quakers moved for a *certiorari*, and though cauſe was ſhewn againſt the iſſuing of it, yet a *certiorari* was granted; and the return filed, and exceptions were taken to it, and argued at the bar. Lord *Mansfield* Chief Juſtice delivered the opinion of the court: That the *certiorari* ought not to have iſſued at all; that the return ſhould be taken off the file, and all proceedings thereon fall to the ground, and that the orders of the juſtices and ſeſſions ſhould be remanded. The order of the juſtices (he obſerved) was made on the ſtatute of the 1 *Geo.* 1. *ſt.* 2. *c.* 6. which extends the c. 34 7 & 8 *W.* 3. c. 4. concerning tithes, to all cuſtomary payments due to clergymen. Theſe two acts are to be taken together as one law. They were intended for the benefit of the quakers; to prevent their being liable to expenſive ſuits for refuſing to pay tithes upon ſcruples of conſcience, by giving

giving an apparent compulſory method of levying tithes and other cuſtomary payments in a ſummary way. This proceeding cannot be removed by *certiorari*, unleſs the title to theſe cuſtomary payments comes in queſtion: And on this proviſo the preſent queſtion ariſes. The affidavits read on the original motion for the *certiorari* ſet forth, that before the juſtices and the ſeſſions, the defendants controverted the right of the curate to theſe cuſtomary payments. The affidavits againſt the *certiorari* ſay, that theſe payments have been paid from time immemorial; that no inhabitant ever diſputed it but theſe quakers; that they have enjoyed the meſſuages but a few years, and that the former inhabitants never diſputed the right of the parſon. Taking theſe affidavits together, it is clear that the quakers controverted the right to the cuſtomary payments only as all quakers controvert the payment of all dues to all clergymen upon ſcruple of conſcience, which is the caſe directly within the act, and the proceeding muſt therefore follow the directions of the act. The quakers themſelves have acknowledged the juriſdiction of the juſtices, by appealing to the ſeſſions; whereas had they intended to diſpute the title to theſe cuſtomary payments, they would at firſt have removed the order of the two juſtices by *certiorari*. The only difficulty remaining ariſes from the return being already filed. But there are ſeveral inſtances of this court ſuperſeding a *certiorari* after the return filed: As where an order of juſtices is removed, and it appears upon the return, that the parties had a right to appeal to the ſeſſions, and that the time for appealing was not expired when the *certiorari* iſſued; in ſuch a caſe, this court ſuperſedes the writ of *certiorari*, *quia improvide emanavit*; the ſame muſt be done in the preſent caſe. 2 *B. E. L.* 458.

Tithes ſet out and ſevered from the nine parts, become lay chattels, and muſt be ſued for in the temporal courts only. See *page* 142.

And judgment of *præmunire* hath been given againſt a man, for ſuing in the ſpiritual court for tithes, alledging the ſame to be ſevered from the nine parts. 3 *Inſt.* 121.

Notwithſtanding all theſe ſtatutes, tithes, (if of any conſiderable value) are now generally ſued for in the courts of equity by *Engliſh* bill, and for the moſt part in the Exchequer; but not upon the ſtatute for treble or double value: For there can be no ſuit in equity for the recovery of the double or treble value. *Wood b.* 2. *c.* 2. *Will.* 463.

If the incumbent dieth, his executor may recover the tithes which became due in the teſtator's life-time; but he is not intitled to the treble value upon the ſtatute. 1 *Vern.* 60.

A rector agreed with his pariſhioner for tithes, for a certain ſum payable yearly at *Michaelmas*. The rector died about a month before *Michaelmas*. The agreement determining by the death of the parſon, the ſucceſſor ſhall be intitled to tithes in kind only from the death, and the executor of the laſt incumbent to a proportion, according to the agreement, till the time of the teſtator's death: and this is by an equitable conſtruction. *Bunb.* 294.

Where tenants for life die, before the rent is payable, rent may be recovered from under-tenant.

By the ſtatute of the 11 *Geo.* 2. *c.* 19. *ſect.* 15. "Whereas, where a leſſor or landlord having only "an eſtate for life in the lands, tenements or here-"ditaments demiſed, happens to die before or on "the day on which any rent is reſerved or made "payable, ſuch rent, or any part thereof, is not "by law recoverable by the executors or admini-"ſtrators of ſuch leſſor or landlord; nor is the per-"ſon in reverſion intitled thereto, any other than "for the uſe and occupation of ſuch lands, tene-"ments

" ments or hereditaments, from the death of the " tenant for life; of which advantage hath been " often taken by the under-tenants, who thereby " avoid paying any thing for the ſame: For re- " medy thereof, it is enacted, That where any " tenant for life ſhall happen to die before or on " the day on which any rent was reſerved, or " made payable, upon any demiſe or leaſe of any " lands, tenements or hereditaments, which de- " termined on the death of ſuch tenant for life, " the executors or adminiſtrators of ſuch tenant " for life ſhall and may, in an action on the caſe, " recover of and from ſuch under-tenant of ſuch " lands, tenements or hereditaments, if ſuch te- " nant for life die on the day on which the ſame " was made payable, the whole, or if before ſuch " day, then a proportion of ſuch rent, according " to the time ſuch tenant for life lived, of the " laſt year, or quarter of a year, or other time in " which the ſaid rent was growing due as afore- " ſaid; making all juſt allowances, or a propor- " tionable part thereof reſpectively."

Stat. 5 *Geo.* 3. *c.* 17. intitled, An act to confirm all leaſes already made by archbiſhops and biſhops, and other eccleſiaſtical perſons, of tithes and other incorporeal hereditaments, for one, two or three lives, or twenty-one years; and to enable them to grant ſuch leaſes, and to bring actions of debt for recovery of rents reſerved and in arrear, on leaſes for life or lives.

Sect. 1. Whereas it may be doubtful whether, by the laws now in force, archbiſhops or biſhops, maſter and fellows, or any other head and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, or any other perſon or perſons having any ſpiritual or eccleſiaſtical promotions, heretofore had, or now have, any power to make or grant any leaſe or leaſes of tithes, or other incorporeal

hereditaments only, which lie in grant and not in livery, for one, two or three lives, or for any term or terms of years not exceeding twenty-one years, although the ancient rent, or yearly ſum, is thereby mentioned to be reſerved; and all other requiſites preſcribed by the acts of parliament now in being to that end, or any of them, were or are juſtly and truly obſerved and performed, by reaſon that there is generally no place wherein a diſtreſs can be had or taken for ſuch rent or yearly ſum; and it may be alſo doubtful, whether, in caſes of ſuch leaſes for life or lives, there is any remedy in law for ſuch eccleſiaſtical or other perſons, by action of debt or otherwiſe, for recovering the rent or yearly ſum due and arrear, which is mentioned to be reſerved on ſuch leaſes for life or lives; therefore, for obviating all doubts touching the ſame, and enabling the ſaid archbiſhops and biſhops, maſters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and other eccleſiaſtical perſons, to make valid leaſes of ſuch their incorporeal hereditaments, and to recover the rent or yearly ſum mentioned to be reſerved on any leaſes by them already granted, or to be granted, for any one, two or three lives, as aforeſaid; and alſo to make good and effectual all ſuch leaſes as have already been granted by them: Be it therefore enacted, *&c.* That all leaſes for one, two or three life or lives, or any term not exceeding twenty-one years, already made and granted, or which ſhall at any time from and after the paſſing this act be made or granted, of any tithes, tolls or other incorporeal hereditaments, ſolely, and without any lands or corporeal hereditaments, by any archbiſhop or biſhop, maſter and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and every other perſon

Leaſe of tithes, &c. made by eccleſiaſtical perſons, declared to be good in law.

perſon and perſons, who are enabled by the ſeveral ſtatutes now in being, or any of them, to make any leaſe or leaſes, for one, two or three life or lives, or any term or number of years not exceeding twenty-one, of any lands, tenements or other corporeal hereditaments, ſhall be, and are hereby deemed and declared to be, as good and effectual in law againſt ſuch archbiſhop, biſhop, maſter and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and other perſons ſo granting the ſame, and their ſucceſſors, and every of them, to all intents and purpoſes, as any leaſe or leaſes already made or to be made, by any ſuch archbiſhop or biſhop, maſter and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and other perſons having ſpiritual promotion, of any lands or other corporeal hereditaments, now are, by virtue of the ſtatute of the thirty-ſecond year of king *Henry* the *Eighth*, or any other ſtatute now in being; any law, cuſtom or uſage, to the contrary thereof, in any wiſe notwithſtanding.

Sect. 2. Provided always, That nothing herein contained ſhall extend, or be conſtrued to extend, to enable any maſter and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, or other eccleſiaſtical perſons as aforeſaid, to grant leaſes for any longer or other terms than by the local ſtatutes of their ſeveral foundations they are now reſpectively enabled to do.

But maſters and fellows of colleges are diſabled, &c.

Sect. 3. And in caſe the rent or rents, yearly ſum or ſums, reſerved or made payable in or by any leaſe or leaſes already made, or to be made, by any archbiſhop or biſhop, maſter and fellows, or

Actions may be brought for recovery of rent reſerved on ſuch leaſes.

or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and every other perſon and perſons ſo enabled to make leaſes as aforeſaid, for one, two, or three life or lives, or years, in purſuance of the ſeveral acts of parliament already in being, or by this preſent act, or any part thereof, ſhall be behind or unpaid by the ſpace of twenty-eight days next over or after any of the days, whereon the ſame, by ſuch leaſe or leaſes, now are, or hereafter ſhall or may be reſerved and made payable; then, and ſo often, and from time to time, as it ſhall ſo happen, it ſhall and may be lawful for ſuch archbiſhop or biſhop, maſter and fellows, or other head and members of colleges or halls, deans and chapters, prebendaries, precentors, maſters and guardians of hoſpitals, and other perſons ſo making or granting, or having made or granted, ſuch leaſes as aforeſaid, or their executors, adminiſtrators, and ſucceſſors reſpectively, to bring an action or actions of debt againſt the leſſee or leſſees, to whom any ſuch leaſe or leaſes, for life or lives, or years, now are, or hereafter ſhall be made and granted, his, her, or their heirs, executors, adminiſtrators, or aſſigns, for recovering the rent or rents which ſhall be then due and in arrear, to any ſuch archbiſhop or biſhop, maſters and fellows, or other heads and members of colleges or halls, deans, chapters, precentors, prebendaries, maſters and guardians of hoſpitals, and other perſon or perſons before mentioned, his or their executors, adminiſtrators, or ſucceſſors, in ſuch and the ſame manner, as fully and effectually to all intents and purpoſes, as any landlord or leſſor, or other perſon or perſons, could or might do for recovering of arrears of rent due on any leaſe or leaſes for life or lives, or years, by the laws now in being; any law, ſtatute, uſage, or cuſtom to the contrary notwithſtanding.

Sect. 4.

Sect. 4. And this act ſhall be deemed and taken to be a public act; and ſhall be judicially taken notice of as ſuch, in all courts of law and equity, without ſpecially pleading the ſame.

CHAP. VII.

Of ſuits in the court of Exchequer *concerning tithes, and the proceedings in ſuch ſuits.*

A Vicar preferred his bill for tithe herbage and ſmall tithes; it was objected for the defendant, that tithes for the depaſturing of barren and unprofitable cattle may be due of common right, but not to the vicar; therefore it lies upon him to ſhew that he was endowed of it, or at leaſt that it hath been uſually received by the vicar, which would be an evidence of an endowment: As to the tithe of meadow ground that hath been mowed, of which the vicar has had the tithe, and after it is depaſtured by unprofitable Cattle, there is no tithe due for that. *Note*; the copy of the *Valor beneficiorum* (which was taken by commiſſion in the reign of *Hen.* 8.) was produced, and it did not appear that this demand of the plaintiff was mentioned there among the other ſmall tithes. Lord Chief Baron *Bury* and *Mountague contra Price*, that the bill ſhould be diſmiſſed.

A vicar needs not ſet forth how he is intitled to tithe-herbage and ſmall tithes. *Hard.* 321, 130, 131.

N. B. It was objected to an evidence, that he had the inheritance of lands within the pariſh (though he was not an inhabitant, and the lands were in the hands of a tenant) and therefore his evidence would be to diſcharge the inheritance of the lands of the tithes; which would be ſuch an advantage to him, as to render him not indifferent: but notwithſtanding this objection, which goes only to the credit of a witneſs, he was admitted to be read.

That a witneſs has the inheritance of lands in the pariſh (in the hands of a tenant) only goes to his credit.

Mr.

Mr. *Forteſcue Aland* being made a baron, this cauſe was heard *July* 17, 1717. and then the plaintiff produced the endowment of the vicar by the dean and chapter of *York*, whereby the vicar is endowed *de omnibus & omnimodis minutis decimis quibuſcunque*; and as to the *valor beneficiorum* it was ſaid, that there were other tithes not mentioned in that book, which the defendants themſelves admit belonged to the vicar; and by the opinion of the four barons, the defendants were decreed to account with coſts. *Bunb.* 7, 8. *Trin.* 1716.

Value of the tithes to be aſcertained by plaintiff's oath, in what caſe.

Bill for tithes; the defendant ſtood out till a ſequeſtration, and the bill was taken *pro confeſſo*: It was moved for the defendant, that upon paying the coſts, the value of the tithes might be aſcertained, and reduced either by the taxation of the maſter, or by the oath of the plaintiff himſelf, as was done in the caſe of *Croſman* and *Goodrick*, *Hil. Term* 2 *Jac.* 2. But *Nota*, there was a conſent in that caſe; and the court now would make no other rule, but that the plaintiff ſhould ſhew cauſe why he ſhould not conſent to give his oath to the value. *Bunb.* 26. *Trin.* 1718.

Exemption from tithes, how to be laid.

This was a bill for tithes; the defendant inſiſted that the lands where, *&c.* were part of the homeſtall which is part of the biſhop of *London*'s palace, and therefore exempt from payment of tithes, but did not lay it perſonally in the biſhop; and this was allowed by Lord Chief Baron *Bury* and baron *Price* againſt *Page*, to be well enough, becauſe the exemption goes along with the lands; although it would have been better laid by way of formal preſcription as at law; that the biſhop for himſelf and his tenants have time out of mind, *&c.* and as to lands belonging to a monaſtery, they muſt ſet forth how the preſcription is; but where the land itſelf is exempt, it is diſcharged, in whatever hands it comes; and by the opinion of two barons againſt

againſt one (*abſente Mountague*) the bill was diſmiſſed. *Trin.* 1718. *Bunb.* 26.

If to a bill for tithes the defendant doth not ſhew a tender before, or make it in the anſwer, the plaintiff is intitled to an account, although the value be never ſo ſmall; if there hath been a tender before, and a tender is alſo made by the anſwer, the defendant ſaves his coſts; if the tender is only by the anſwer, he muſt account with coſts. *Bunb.* 28. *Mich.* 1718.

At what time a tender of tithes ſaves defendant's coſts.

Bill for tithes; defendants in their anſwer inſiſted, that the lands where, *&c.* were formerly belonging to the abbot of *Crowland*, and therefore exempt; but do not ſay, that they were diſcharged when parcel of the abbey lands, though not one of the orders which was diſcharged. (*Nota*, this was one of the greater monaſteries diſſolved by the ſtat. 31 *Hen.* 8.) And the defendants inſiſted, that conſtant non-payment was a ſufficient evidence of an exemption, eſpecially being coupled with being parcel of one of the greater monaſteries: and in the caſe of *Collard* v. *Newton*, *Hil. Term.* 1681. the defendant there inſiſted, that the lands, *&c.* were diſcharged by bull, order, preſcription, or ſome other way, and allowed to be good. But *the Court* unanimouſly decreed for the plaintiff in the preſent caſe, for that the proof was not full as to non-payment, and alſo though the defendant ſays the lands were in the abbot's hands, yet he does not ſay they were diſcharged in his hands; and the ſtat. 31 *Hen.* 8. extends only to *ſuch*. *Bunb.* 37, 38. *Hil.* 1718.

Exemption of lands from tithes, as belonging to one of the greater monaſteries, how to be laid in bill.

Bill by a vicar for tithes; the defendant admitted in his anſwer, that the plaintiff was intitled to all ſorts of tithes, but inſiſted upon a ſpecial exemption; upon this admiſſion the plaintiff was not obliged to ſhew any ſpecial title either by endowment or preſcription, which, otherwiſe, he ought

Vicar, in what caſe need not ſhew any ſpecial title by endowment or preſcription.

to have done. *Bunb.* 72. *Paſch.* 1720. *Pye* v. *Rea.*

Bill by a vicar for tithe herbage and furze.

Bill by the vicar of *Eynſham* in the county of *Oxford* for ſix years tithe herbage and furze, of a cloſe called *Amberry* alias *Hamborough Cloſe* in the pariſh of *Eynſham:* The defendants inſiſted, that they did not know that the vicar was intitled to theſe tithes, that they were informed no tithes thereof ought to be paid to the vicar; but that the great tithes, and furze, (if any was due) belong to the impropriator; and then ſay, that it was part of the diſſolved abbey of *Eynſham*, and exempted by the ſtat. 31 *Hen.* 8. The plaintiff made out his proof, that the vicar was intitled to all ſmall tithes within the pariſh, that the great tithes were conſtantly paid to the impropriator, and gave one inſtance within thirty years of a compoſition with the vicar for the agiſtment tithe of this cloſe. The defendant's proof was negative, that they never knew tithe paid for this cloſe; and although it was objected, that a vicar ſhould make out a fuller title to the ſmall tithes, yet the court were of opinion it was ſufficient; and decreed the defendant to account. *Bunb.* 144, 145. *Hil.* 1723. *Goole Clerk* v. *Jordan et al'.*

Exception allowed for not ſetting forth quantities and values of tithes particularly.

Bill for tithes; exception taken to the anſwer, that the defendant doth not ſet forth quantities and values: The defendant ſets forth what tithable matters he had, and ſays, he had no other tithable matters whatſoever: Barons *Price* and *Page* thought this ſufficient, and he ſhould have ſet forth particularly, that he had not ſuch and ſuch things as charged in the bill; and upon their opinion the exception was allowed. (But *Nota*, this ſeems very extraordinary, and contrary to the conſtant method of drawing anſwers:) Baron *Mountague* thought it would be well enough, if the defendant ſays, he has no other tithable matters in the bill mentioned. But *Nota*, then it might be thought

thought inſufficient, if there were (as is uſual) a charge in general in the bill, that the defendant had divers other tithable matters. *Bunb.* 108. *Paſch.* 1722. *Baker* v. *Planner et al'.*

Whether a lay impropriator muſt ſet forth his title.

Bill by the plaintiff as leſſee of the impropriate rectory of *Normandy* in the county of *Lincoln*, for tithe hay: It was inſiſted upon for the defendant, that the plaintiff (being a lay impropriator) had not ſet forth a ſufficient title; and upon *that* the long controverted queſtion, whether there was any difference between a lay and a ſpiritual perſon (claiming tithes) was revived: but it was not now determined; for, *per Curiam*, the title was well enough ſet forth in the preſent caſe. The defendant inſiſted upon a *Modus* of 4 *s.* payable at *Eaſter*, in lieu of tithe hay ariſing in his farm, and other lands particularly ſet forth: But *per Curiam*, this is a void *Modus*, becauſe it may introduce a fraud; for if a farmer ſhould turn all his arable land into meadow, he would be diſcharged of the whole for four ſhillings; beſides it is too uncertain, it not being certain what a farm conſiſts of. *Bunb.* 129. *Paſch.* 1723. *Burwell* v. *Coates.*

Injunction to the ſpiritual court to ſtay a libel for tithes, where a *Modus* is ſought to be eſtabliſhed.

Bill ſuggeſted, that there was a *Modus* of four-pence *per* ſcore of all ſheep going on *Gayerfield* in the pariſh of *Ryton* in the county of *Durham*, in lieu of tithe of lamb and wool; that the defendant libelled in the ſpiritual court for tithes in kind; that the plaintiff moved for a prohibition in the court of pleas in *Durham*, but permitted a conſultation to go, and depended on relief in this court, and prayed to have the *Modus* eſtabliſhed: the defendant doctor *Finney* inſiſted there was no ſuch *Modus*, but that the four-pence was in lieu of the milk of the ewes, which was uſual in that country.

Now, upon motion for an injunction to the ſpiritual court, the defendant's counſel inſiſted, that this was proper matter of ſuggeſtion on a prohibition;

tion; and alſo the defendant had in the anſwer denied the *Modus:* But *per Curiam*, there being ſome diſpute between the parties, whether the *Modus* is as alledged in the bill, and as the ſpiritual court cannot try the *Modus*, we will grant the injunction. *Bunb.* 176. *Trin.* 1724. *Sir Edward Blacket* v. *Doctor Finney.*

The ſtatute of limitations not pleadable to a bill for tithes.

Bill by a lay impropriator for tithes for about twenty-four years. The defendant, as to ſuch part of the bill as prays diſcovery and relief for any time before within ſix years next before the filing the bill or ſerving the *Subpœna*, pleads the ſtatute of limitations, and that he did not promiſe to make any ſatisfaction for any tithes before the ſaid ſix years. This plea was now argued, and over-ruled *per totam Curiam*; for the defendant, as to the tithes, is in the nature of a *receiver* or bailiff for the plaintiff; in which caſe the ſtatute of limitations does not operate:—Cited for the plaintiff, *Cro. Car.* 513. 1 *Saund* 38. 2 *Saund. Webber* v. *Tyrrell.*—Cited for the defendant, *Cro. Car.* 115. *Hetley* 111. *Bunb.* 213. *Paſch.* 1726. *Marſton* v. *Claypole et al'.*

Curate perpetual removeable at pleaſure, and he cannot ſue for tithes.

The plaintiff preferred his bill as perpetual curate of *Bovington*, being a chapel annexed to the church of *Hemel Hemſted* in the county of *Hertford*, againſt the defendants, inhabitants and occupiers of lands within the ſaid chapelry: he made his title under a nomination to his curacy in the year 1716, by *Cornelius Price*, then vicar of *Hemel Hemſted*, who alſo gave him, by the ſame inſtrument, the ſmall tithes in *Bovington*, with power to ſue for them in his (the vicar's) name; and he alſo ſet forth a licence to preach from the then biſhop of *Lincoln*; and alſo that *Topping* (*Price*'s ſucceſſor) in *June* 1722, granted him a new nomination to this curacy expreſly for life, with like power to ſue for the ſmall tithes in both their names. But though he took a ſecond nomination, yet that by the firſt, and

and the biſhop's licence, he was ſufficiently intitled to the tithes, becauſe by ſuch nomination he became perpetual curate. But *per Curiam* (Lord Chief Baron *Pengelly* and baron *Carter* only in court) The bill muſt be diſmiſſed, for no title appears in the plaintiff; for though a curate is appointed by a vicar, either generally, or expreſly for life, yet ſuch appointment is in its own nature revocable at law, even without any cauſe aſſigned, and by the eccleſiaſtical law upon cauſes ſhewn; ſo that the plaintiff had not ſuch a permanent intereſt as to claim any tithes.

Nota, *per* baron *Carter*, If a biſhop grants ſuch licence to a curate to preach, and after is tranſlated, there is no neceſſity for a new licence by the ſucceeding biſhop. (But *quære de ceo*, for *videtur aliter.*)

Nota, in this caſe *Topping* was made a party, but not brought to hearing; which, *per Curiam*, muſt have been done before the plaintiff could have a decree, if he had had a title in the other reſpect. *Bunb.* 273, 274. *Mich.* 1729. *Price* v. *Pratt et al'.*

Bill was preferred for twelve or thirteen ſorts of tithes, and the plaintiff did not abridge his demand by his replication: upon the hearing it was referred to an account, but coſts were reſerved generally till the report came in. Now upon the report it appeared, the defendant was indebted to the plaintiff for one ſpecies of tithes only (*viz.* wood) forty pounds, but not for any of the other tithes demanded by the bill; and therefore it was inſiſted for the defendant, that the plaintiff ſhould have his coſts only *quoad* the wood, which was reported for him, but that he ought to pay coſts for all the others demanded, and which he had not proved. *Nota*, this ſeemed very reaſonable, the plaintiff not having abridged his demand by his replication, but having put the defendant to the trouble and expence of entering upon proof of

Bill for 13 ſorts of tithes, and the plaintiff proves but one ſpecies due, and doth not abridge by his replication, yet the court decreed him coſts generally.

the other matters. But the court (too haſtily) decreed coſts generally to the plaintiff. *Bunb.* 335. *Hil.* 1733. *Smith* v. *Morgan.*

A lay impropriator only proved that tithes belonged to perſons under whom he claimed, and ſufficient.

A lay impropriator by his bill ſets forth, that in the year 1724. he was ſeiſed in fee of all impropriate tithes in the townſhip of *Weſtbaughton* in the pariſh of *Dean* in the county of *Lancaſter*. Upon the hearing he went no further in his evidence of the title, than that about thirty-four years ago theſe tithes were reputed to belong to the *Andertons* of *Loſtock*, under whom the plaintiff claimed. It was objected for the defendant, that here was not a ſufficient title ſhewn, ſince a layman was not capable in *perpetuity* but from the crown, ſince the 30 *Hen.* 8. and therefore it was incumbent on the plaintiff to ſhew how he derived them out of the crown. But *per totam Curiam*; If he had ſet out in his bill a title under the crown, and derived it down, he muſt have proved it as he had ſet it forth; but ſince he had not, this proof was ſufficient. (*Quod nota & quære* former practice.)

Where a general exemption is inſiſted on, a partial one cannot be admitted in proof.

The defendant in his anſwer inſiſted, that his lands were diſcharged as being parcel of the poſſeſſions of the abbey of *Cockerſand*, diſſolved by the ſtat. 31 *Hen.* 8. but there having been ſeveral inſtances of payment of tithes of corn in kind, they farther alledged, that ſince no hay had ever been paid, that as to *that* ſpecies of tithe they ought in all events to be diſcharged, as againſt a lay impropriator. But *per Curiam*; Though a defendant may in equity inſiſt on ſeveral defences which are conſiſtent, yet having undertaken to prove a general exemption, and failing in *that*, he cannot have the benefit of the other point; ſo the defendant was decreed to account generally. *Bunb.* 296, 297. *Hil.* 1730. *Leigh* v. *Maudeſley.*

Modus, although it be pleaded, yet quantities and values muſt be ſet forth.

Bill by a vicar for tithes; the defendant pleads that the plaintiff employed a perſon to collect the tithes, and that he the defendant paid the collec-

tor

for five pounds, and doth not ſet forth quantities and values; ſo the plea was over-ruled with coſts; for this court never admits a plea, even of a *Modus*, to cover the diſcovery of quantities and values; becauſe the defendant may die before they go to examination, and then tithes lying only in the perſonal knowledge of the party, there would be no way of coming to the knowledge of the particulars: And the caſe in *Hard.* was denied, and it was ſaid it had often been ſo. *Bunb.* 60. *Paſch.* 1720. *Gunaley* v. *Fontleroy.*

Bill for tithes by the biſhop and ſequeſtrator during the incapacity of the incumbent, diſmiſſed for want of making the incumbent a party.

Bill by the biſhop of *London*, and *Beaumont* as ſequeſtrator during the incapacity of mind of *Barefoot* the preſent incumbent, for tithe-wood in the pariſh of *Birchanger* in the county of *Eſſex*: The defendant demurs, for that it does not appear, that either of the plaintiffs had any title; and it was inſiſted upon by the counſel for the defendant, that (now, ſince the diviſion of pariſhes) the whole right to tithe was veſted in the rector, and the biſhop had nothing to do with the right (even ſince the ſtat. *H.* 8. which relates to a vacancy) but only to take care that the cure be ſupplied, and the profits ſequeſtered for that purpoſe; and the other plaintiff was only a ſequeſtrator, who, as it appears by the form of the ſequeſtration, and by his own ſhewing in the bill, was only an agent or collector; beſides, the incumbent *Barefoot* ſhould have been made a party, for poſſibly, at this time, he may have recovered his right ſenſes; and if he ſhould exhibit his bill, a recovery *now* could not be pleaded in bar of his demand. Baron *Price* was of opinion, that no decree could have been for the plaintiff, if it had been a ſequeſtration during the vacancy, nor can there be in this caſe: But *Page* and *Gilbert* barons were of opinion the bill had been well enough, if *Barefoot* had been party, either in perſon or by his committee; and the bill was diſmiſſed, but without coſts, the want of parties not being ex-

preſly aſſigned as a cauſe of demurrer. And *not a*, the words ("and for divers other cauſes, *&c.*") were not in the demurrer, as they ſhould have been. *Bunb.* 141. *Mich.* 1723. Biſhop of *London* and *Beaumont* v. *Nichols.*

Plea of a decree in Chancery to eſtabliſh Modus's to a bill for tithes, allowed.

Bill for tithes as vicar of *Biſhop's Lyddiat* in the county of *Somerſet*, ſets forth a former bill in this court in 1717, and a decree in 1718, for theſe tithes, after iſſue (to try *Modus's*, and verdict for the plaintiff.) The defendant pleads, that in *Trinity term* 1721 he preferred his bill in the court of Chancery to eſtabliſh the *Modus's*, *&c.* that iſſues were directed, and found for the *Modus's*, and decreed thereupon to be eſtabliſhed, and pleads the ſame verdict and decree in bar of the plaintiff's now demand; and the plea was allowed *per totam curiam.* *Bunb.* 211. *Hil.* 1725. *Geale* v. *Wyntour.*

CHAP. VIII.

Of Prohibitions in Suits for Tithes.

What is a prohibition.

PROHIBITION iſſues out of the Chancery; *B. R.* or *C. B.* into the ſpiritual court, admiralty, court of Chivalry, *&c.* to forbid a judge, *&c.* to proceed in a cauſe, that belongs to the Common law courts, or that belongs not to their juriſdiction, though the courts at law can give no remedy, or it may forbid a judge of any temporal court, to proceed in any cauſe depending before him, upon ſuggeſtion that the cognizance of the cauſe does not belong to him. *Wood's Inſt.* 570.

When to be granted.

The king's courts that may award prohibitions, being informed by plaintiff or defendant, or by any ſtranger, That any court temporal or eccleſiaſtical, do hold plea, where they have no juriſdiction,

tion, may lawfully prohibit that court, as well after judgment and execution, as before, and if the judge of the inferior court, or the party, proceeds notwithſtanding a prohibition, an attachment may be had againſt them, or an action of the caſe will lie againſt them; but upon a prohibition in the ſpiritual court, the party may appear and take a declaration upon the ſuggeſtion, and go to trial; and if thereupon it be found againſt the plaintiff in the prohibition, a writ of conſultation will be awarded with coſts. *Wood's Inſt.* 570.

Prohibition grantable *ex debito juſtitiæ.*

It is in the diſcretion of a court to deny a prohibition, when it appears to them, that the ſurmiſe is not true; *per Hobart* Ch. Juſtice, *Hob.* 67. *pl.* 71. in the caſe of *Aſton pariſh* v. *Caſtle Brimedge* Chapel. But all the judges agreed, that the granting prohibitions is not a diſcretionary act of the court; but are grantable *ex merito juſtitiæ*, and denied Lord *Hobart*'s opinion, and ſaid, that *Rolle* Ch. J. had frequently done ſo before. *Raym.* 3, 4. *Hil.* 12 *Car.* 2. *B. R.* in the caſe of *Woodward* v. *Bonithan*, *S. P.* That they are grantable *ex debito juſtitiæ*, and are not honorary, and in the diſcretion of juſtices; *per totam curiam. Sid.* 65. *pl.* 38. *Mich.* 13 *Car.* 2. *B. R.* in ſerjeant *Morton*'s caſe. *Raym.* 92. in the caſe of *Ford* v. *Weldon*. *Hil.* 15 & 16 *Car.* 2. *B. R. Hide* Ch. J. affirmed that a prohibition is *ex gratia*, and not *ex debito juſtitiæ*; but *Keyling* and *Twiſden* J. poſitively denied it.

Lowther is parſon of the pariſh of *Swillington*, and Mr. *Scoles* lives in *Kippax* the next adjoining pariſh, and occupies a large parcel of arable land there, and has forty acres of meadow and paſture in *Swillington* and four acres of arable land. *Lowther* libelled in the ſpiritual court of *York* againſt *Scoles* for tithes of the cattle depaſtured in *Swillington*. *Scoles* upon a ſuggeſtion, that barren cattle kept for ploughing the land, and cattle for the pail for the

houſe, ought not by law to pay tithes, and that this cattle, for the tithes whereof *Lowther* now libels, is ſuch, moves for a prohibition. And it was granted to him, *niſi*, &c. And now ſerjeant *Pemberton*, upon affidavit, that *Scoles* carried the milk of this cattle to his houſe in *Kippax*, and uſes it there, and that he made uſe of the dry cattle for ploughing his land in *Kippax*, moved that the rule might be diſcharged. And it was reſolved by the whole court, the defendant *Lowther* ſhould have tithes of the milk. For though *Wright* ſerjeant objected, that if a man have arable land without a houſe, he is intitled to be diſcharged of the tithes of the milk, which maintains the ſervants, who plough the land, as well as if he had a houſe, in which the milk were ſpent; yet the court anſwered, 1. That the law was otherwiſe, for it is of the ſame nature with wood which is burnt in the houſe, which is exempt from the paying of tithes, only ſo long as it is in the houſe. So the law is in this caſe of milk, which is only diſcharged of tithes, becauſe it is uſed in the houſe. And *per curiam*; Of common right tithe-milk is payable at the parſonage or vicarage houſe. 2. As to the tithes for the agiſtment of the barren cattle, the court ſaid, That if in this caſe there had not been any arable land in *Swillington*, it is without doubt, that the parſon ought to have had tithes. For the reaſon why cattle of the plough is excuſed from the payment of tithes is, becauſe they are employed for the improvement of the arable land in the ſame pariſh, by which the parſon has better tithes of the arable land; but here that reaſon fails, for the parſon of *Swillington* has no tithes of the land in *Kippax*. In the ſame manner where a man has wood in one pariſh, and arable land in another; if he makes uſe of this wood in making fences for his arable land, yet he ſhall pay tithes to the parſon where the wood grows. But it had been otherwiſe if it had been

Milk is only diſcharged of tith. a whilſt it is ſpent in the houſe The ſame law of wood.

Tithe-milk is payable at the parſonage or vicarage houſe of common right.

Cattle of the plough are excuſed from the payment of tithes, in reſpect they till the arable land.

Wood to fence arable land excuſed of tithes.

the

the ſame pariſh. The ſame law, where the wood grows in one pariſh, and is ſpent in the owner's houſe in another pariſh. Now then the queſtion here will be, whether the ploughing of theſe four acres of land in *Swillington* will excuſe this cattle from the payment of tithes; and *per curiam*, It will excuſe only thoſe cattle which only plough that land of the four acres, and not thoſe which plough any land in *Kippax*. For the parſon ought to have ſomething in lieu of the loſs of thoſe tithes, which can only be of the four acres in *Swillington*. Then *Powell* Juſtice took exception to the ſuggeſtion, where the plaintiff ſuggeſts, that this barren cattle plough the land, *&c.* but does not ſay, *per quod* the parſon had *uberiores decimas* in another place. And (by him) *uberiores decimæ* does not ſignify only, that the parſon will have better tithes out of the arable land, than he would have had, if the cattle had not ploughed it; but it ſignifies, that he will have ſo much more tithes (than otherwiſe he would have had) as will fully recompence the loſs of the tithes of the cattle; or it will (as he expreſſes it) overweigh that loſs. But as to this ſignification of *uberiores*, *Treby* Chief Juſtice doubted much. But in the principal caſe a prohibition was granted *quoad* this cattle, which only ploughed the land in *Swillington*. And as to the reſt, *Lowther* had liberty to proceed below. *Ld. Raym.* 129, 130. *Mich.* 8 *Will.* 3. *Scoles* v. *Lowther*.

A. has lands in the pariſhes of *B.* and *C.* if the cattle plough both theſe lands they ſhall pay tithe.

Uberiores decimæ, what?

In attachment upon prohibition the plaintiff declared, that there is, and time out of mind, *&c.* hath been, a cuſtom within the hundred of *Huntspittle* in the pariſh of *Huntsbritch* in *Somerſetſhire*, that every occupier of land within the hundred ſhould be diſcharged of tithes of agiſtment of barren cattle, not employed in the plough, nor for the pail; that the plaintiff was an inhabitant for five years paſt, and yet is, within the hundred, and occupies land there, and was and yet is poſſeſſed of

divers barren cattle, for the tithes of which (notwithſtanding the ſaid cuſtom) the defendant libelled againſt the plaintiff in the ſpiritual court, &c. and he declares alſo upon two *Modus's* for tithes of lambs, &c. and that the defendant ſued for tithes of them, &c. The defendant traverſed the *Modus's* and the cuſtom, and verdict for all was given for the plaintiff. And upon motion in arreſt of judgment by ſerjeant *Gould*, that this cuſtom was void, The queſtion was, whether a hundred may preſcribe generally in a *non decimando*, as in this caſe, to be free from the payment of tithes for herbage or agiſtment of cattle. And after ſeveral arguments at the bar it was reſolved, 1. That in things tithable by cuſtom only, and not *de jure*, a county or hundred might preſcribe *in non decimando* generally; for in that caſe the county, &c. is diſcharged without a cuſtom to the contrary; ſo that it is but to inſiſt upon the old right, againſt which the cuſtom has not prevailed. See 13 *Co.* 12. 1 *Rol. Abr.* 653, 654. 1 *Rol. Rep.* 22. 2 *Bulſtr.* 185. *March* 25. But for things which are tithable *de jure*, a county or hundred could not preſcribe *in non decimando*, no more than a particular perſon; for it would be abſurd to ſay, that a hundred ſhall preſcribe *in non decimando*, where the particular perſons, of which it conſiſts, could not.

In what things a hundred may preſcribe *in non decimando*.

2. They reſolved, that wood is not *de jure* tithable, becauſe it does not renew annually. *Seld.* 237. 13 *Co.* 13. where it is ſaid, that in libels in the ſpiritual court for tithes of wood they allege a cuſtom. (But note, the practice of the ſpiritual court was affirmed at this day to be otherwiſe; but the court did not regard that; for *Holt* Chief Juſtice ſaid, that they made ſtones, gravel, and all things tithable.) And therefore the caſe in *March* 25. 1 *Rol. Abr.* 643, 4. may be good law, for the caſe there is of wood. But this principal caſe is of agiſtment of cattle, which is *de jure* tithable,

Wood is not *de jure* tithable.

as

as being recompenced by the graſs, hay, *&c.* which otherwiſe would yield tithes; and therefore the cuſtom is void. And the court did not only arreſt the judgment, but cauſed this entry to be made, *quia apparet curiæ domini regis, &c. quod cuſtuma prædicta, &c. nullius eſt vigoris, ideo conſultatio, &c.*

For the defendant theſe books were cited in this caſe. *Bro. Diſmes* 13. *Doct. & Stud. lib.* 2. *c.* 55. *Plowd.* 645. 1 *Roll. Abr.* 635. *pl.* 8. *Hob.* 297. 2 *Co.* 44. 8 *H.* 7. 1. *b.* 1 *Sid.* 447. For the plaintiff 1 *Sid.* 321. 13 *Co.* 12. *Dyer* 363. 2 *Bulſtr.* 285. *March* 25. 2 *Saund.* 145. *Ld. Raym.* 137, 138. *Hil.* 8 & 9 *Will.* 3. *Hicks* v. *Woodſon.*

A prohibition was granted to a ſuit for tithes of cows, calves, herbage, and paſture, upon ſuggeſtion of a cuſtom, that every pariſhioner from time whereof, *&c.* had uſed to pay for every cow having a calf 1 *d.* for every cow not having a calf 1 *d.* $\frac{1}{2}$ as far as five cows, and for five cows 1 *s.* 3 *d.* and for ſix cows 2 *s.* 6 *d.* and for ten cows 2 *s.* 8 *d.* *in plena ſatisfactione omnium decimarum & vitulorum, & herbagii et paſturæ.* The plaintiff declared in attachment upon this prohibition, and upon traverſe of the cuſtom a verdict was found for the plaintiff in the prohibition. Upon which *Lutwyche* ſerjeant moved in arreſt of judgment in *Eaſter* term laſt paſt. 1. That this cuſtom was void, for it is laid to be a diſcharge of tithes of all cows, which it is not, for nothing is laid for the tithe of the ſeventh, eighth, and ninth cows, and payment for the ſixth cannot be payment for the ſeventh, *&c.* 2. This cannot be a diſcharge of the tithes of herbage and agiſtment, for tithes of one thing cannot be a diſcharge of tithes of another, and tithes are payable of both; then ſince the cuſtom is laid intire it is void in the whole. 3 *Cro.* 446, 447. And of this opinion was the whole court, and therefore judgment was arreſted,

Tithes of one thing cannot be a diſcharge of tithes of another.

and a conſultation granted, unleſs cauſe ſhould be ſhewn this *Trinity* term. At which time ſerjeant *Levinz* moved, that the prohibition ſhould ſtand, becauſe it appears here that there is a cuſtom, and then the ſpiritual court has no juriſdiction to proceed; and therefore variance in caſe of a *Modus* will not hurt, but the prohibition ſhall ſtand, becauſe it appears, that the ſpiritual court has not juriſdiction; and when they have not juriſdiction the Common law pleas cannot allow them to proceed. *Sed non allocatur.* For *per Curiam* the queſtion is here, whether the *Modus* is good or void. If the *Modus* is void the ſpiritual court has juriſdiction, and the *Modus* is void for the reaſons given before. Then *Levinz* moved, That though the cuſtom be void for part, yet it was good for one, two, three, four and five cows, and therefore he prayed, that the conſultation ſhould be granted only for that part which is void, and that the prohibition ſhould ſtand for the reſidue. And by this he ſaid, that a man might have a *Modus* for five cows, and then for the reſidue he ſhall pay tithes in ſpecie. And the court agreed the caſe put by him, but ſaid, that in the principal caſe it was ill in the whole; and a conſultation as to all. In this caſe *Treby* chief juſtice ſaid, that tithes are not payable of aftermowth *de jure*, and therefore it is but form to lay a cuſtom to be diſcharged of tithes of aftermowth in conſideration of making the former mowing into hay, for tithes are payable only of things *ſemel in anno renovantibus.* See *Contra* 1 *Roll. Abr.* 640. *pl.* 11. Parſon of *Stanfield*'s caſe. *Ld. Raym.* 242, 243. *Trin.* 9 *Will.* 3. *Norton* v. *Brigs.*

Modus where void in the whole.

Aftermowth.

Modus for tithes of milk.

Motion was made, that the king's bench would grant a prohibition to the ſpiritual court, where the defendant *Vaux* libelled againſt the plaintiff for tithes of milk. And it was grounded upon a ſuggeſtion of a cuſtom, that every inhabitant in the pariſh, who kept cows there, had uſed time where-

of, &c. to ſet out the whole meal of milk upon the ninth day of *May* at night, and upon the tenth of *May* in the morning, *et ſic ſuper quemlibet nonum diem tunc proxime ſequentem*, until one lamb yeaned in the next year following ſhould be heard to bleat there; and the milk ſet out in ſuch manner the vicar for the time being had uſed to ſend a ſervant to bring to him; and that was in ſatisfaction of all tithes of milk. And a rule was made, that a prohibition ſhould be granted *niſi cauſa*, &c. upon which *Wright* king's ſerjeant at the day appointed argued, that the rule ought to be diſcharged, becauſe unreaſonable cuſtoms are void. *Hob.* 175. *Topſall* v. *Ferrers* 329. *Barker* v. *Cocker*. Then this cuſtom is unreaſonable, becauſe it forces the parſon to ſend for the milk where it is milked; and then if it be a great pariſh, he muſt keep more ſervants than his vicarage will ſuſtain. And in *Raym.* 277. *Dod* v. *Ingleton*, it is held, that tithe milk ought to be brought to the parſon's. And of this opinion was *Rokeby* juſtice. But *Holt* chief juſtice *contra*. For (by him) if a pariſhioner ſets forth a cuſtom, to pay tithes to the parſon at his houſe, though he preſcribes to pay them in kind; this will be a good cuſtom. And for that he cited the opinion of *Popham* chief juſtice, 3 *Cro.* 609. *Auſtin* v. *Lucas*, where he ſays, that a preſcription, to pay to the parſon the tenth quart of milk at the parſon's houſe, would be a good *Modus*. And *per Holt*, the reſolution in *Raym.* 277. is an equitable reſolution founded upon the uſage of the neighbouring pariſhes. See *Palm.* 341, 381. *Wiſeman* v. *Denham*. 2. *Wright* king's ſerjeant argued, that this cuſtom is a plain preſcription *in non decimando* for a great part of the year. For the preſcription is in truth to pay leſs in the compaſs of the whole year than a tenth part. And then no cuſtom is good to pay the ſame thing in kind, unleſs it be paid in a more beneficial manner, than

Tithe milk, where payable.

that

that which the law preſcribes. 3 *Cro.* 609. 2 *Cro.* 47. 1 *Mod.* 229. *Moor* v. *Field.* 1 *Anderſ.* 199. But where there is ſome alteration in the payment of that which the law appoints for the advantage of the parſon, though the advantage be ſmall, yet the cuſtom ſhall be good. *Hob.* 250.

But againſt this *Coniers* king's counſel argued, that the cuſtom was good; for (by him) the uſual time for ceaſing from this payment in this pariſh is the middle of *March*; for being in *Lincolnſhire*, there are no lambs yeaned before that time. Then for the days in which the parſon is deprived of the tithe which the law gives him, he receives very great recompence, in receiving the whole meal of milk every ninth day, when the cows give more milk than they do in *March* and *April*. And he cited the caſe of *Lee* v. *Collins*, 1 *Roll. Abr.* 648. *c.* 3. where it is ſaid, that it is a good *Modus* for tithes of eggs, to pay in *Lent* thirty eggs for all tithes of eggs. *Sed non allocatur*; for (*per totam Curiam*) the cuſtom is ill, and it is a plain *non decimando*. For ſuppoſe a lamb bleats there at the end of *December*, or at the beginning of *January*, the parſon ſhall loſe tithes for four months and more. Then a man cannot preſcribe to pay leſs of the ſame thing; but ought to preſcribe to pay ſome other thing in lieu of it, or to pay it in ſome other manner than the law preſcribes. And *per Holt* chief juſtice, this does not reſemble the caſe of the thirty eggs in *Lent*, for there the cuſtom binds the pariſhioners to the payment of ſo many at that time; and whether he have hens or not he is obliged to it; ſo that he may be obliged to buy eggs to pay the parſon; and that makes it a good cuſtom. But if the cuſtom was, that he ſhould pay thirty eggs of his own hens, the cuſtom would be ill. The rule for the prohibition was diſcharged. *Ld. Raym.* 358. *Mich.* 10 *Will.* 3. *Hill.* v. *Vaux.*

Non decimando.

Thirty eggs of tithes of eggs of his own hens, ill.

Mr.

Mr. *Broderick* moved for a prohibition, to be directed to the ſpiritual court of——to ſtay a ſuit there againſt the plaintiff for tithes of hay and lambs, fed, dropped and nouriſhed upon the plaintiff's land, *&c.* upon ſuggeſtion of a *Modus*, that in conſideration that they uſed to pay the tenth lamb of all the lambs dropped in their pariſh, they uſed to be diſcharged of the tithes of all lambs there fed, *&c.* and as to the tithes of hay, it ſuggeſted a cuſtom within the pariſh, that if any pariſhioner fed his ſheep with his graſs until *June* and *Auguſt*, that then he might mow the courſe graſs, with which they fed their ſheep in the winter, whereby the parſon had *uberiores decimas* of the ſheep, *&c.* and a rule was made, to ſhew cauſe wherefore, *&c.* And now Mr. *Cheſhyre* againſt the prohibition urged, that this was a plain preſcription *in non decimando*, becauſe nothing was payable, if there were not ten lambs; like the caſe of *Dolman* v. *Barton*, 1 *Rol. Abr.* 648. *c.* 4. 1 *Mod.* 229. *Modus* for tithes of lambs and hay.

But Mr. *Broderick e contra* urged, that this was a good *Modus*, becauſe by the canon law diſtribution ought to be made of the tithes of lambs, at the places where the ſheep had been all the year; and therefore the parſon not having right to every tenth lamb, becauſe ſome of them might be but newly bought, the plaintiff paying every tenth lamb, might well in conſideration thereof preſcribe to be diſcharged of the lambs there fed. And he cited 1 *Roll. Abr.* 648. *c.* 1, 649. *pl.* 7. But *per Holt* chief juſtice, The tenth lamb is due to the parſon by common right. And though they may make diſtribution in the eccleſiaſtical courts, that is only among the parſons themſelves, but does not concern the proprietor of the land, who ought to pay the tenth lamb to the parſon by the Common law; and therefore this cuſtom cannot be eſteemed by this court as beneficial to the parſon, and conſequently

it

it is no ground for a prohibition. But this caſe differs from the caſe cited by *Cheſhyre*, becauſe wool is ſeverable, and every part of it tithable, and the parſon may have the tenth ounce, but lambs are intire. But this is not a preſcription *in non decimando*, becauſe under the tenth tithe is not due; and therefore this is not a *Modus in non decimando*, but no *Modus* at all.

As to the *Modus* for the hay, *Cheſhyre* urged, that it was a plain *non decimando*. And for that he cited 1 *Roll. Abr.* 650. *pl.* 13. *Cro. Jac.* 47. *Moor* 683. and the court held it to be a void cuſtom; and therefore the rule was diſcharged. *Ld. Raym.* 677. *Trin.* 13 *Will.* 3. *Selby* v. *Clarke.*

Modus to pay 2 *s.* in the pound out of the rents reſerved, is no *Modus.*

Mr. *Cheſhyre* moved againſt a rule for ſetting this aſide, being granted to diſcharge another rule before made, by which a prohibition was granted to the ſpiritual court, to ſtay a ſuit there for tithes, upon ſuggeſtion of a *Modus*; and this laſt rule was made upon allegation, that the plaintiff had had a prohibition granted before, and that he had declared upon it, and that iſſue had been joined upon it, and a verdict found in it againſt the plaintiff. And that which Mr. *Cheſhyre* now urged againſt this laſt rule was, that this *Modus*, upon which the rule was made for the granting of a prohibition, varies from the *Modus*, upon which the prohibition had been granted before, and the verdict had, *&c.* and therefore that this caſe was not within 50 *Ed.* 3. *c.* 4. for the preſent *Modus* ſuggeſted is, that they have uſed to pay 2 *s.* in the pound of the rent reſerved; whereas the former *Modus* was, that they uſed, *&c.* to pay 2 *s.* in the pound of the profits received; and he cited *Hob.* 192. Againſt this Mr. *Broderick* ſaid, that this *Modus* was not good; for as it is laid in the ſuggeſtion, if the plaintiff keeps the lands in his own hands, he ſhall pay nothing to the parſon; for the *Modus* is laid to be paid out of the rent reſerved. 2. He may let a

leaſe

leaſe at a ſmaller rent upon payment of a fine: and he cited 1 *Roll. Rep.* 378. 2 *Ventr.* 47. But *(per Cheſhyre)* That would be a fraud. *Curia contra*; It would not be a fraud. And *per Holt* chief juſtice; 1. This cannot be a *Modus*, it amounting to as much as the tithes in kind; but it may be a compoſition. 2. A cuſtom cannot be applied to rents reſerved from time to time upon frequent new reſervations. And the rule for diſcharging of the rule granted for the prohibition was made abſolute. *Ld. Raym.* 696, 697. *Mich.* 13 *Will.* 3. *Byne* v. *Dodderidge.*

Prohibition for citing out of the dioceſe.

Mr. *Bridges* moved for the diſcharge of a rule, by which a prohibition was granted *niſi*, &c. to the conſiſtory court of the archbiſhop of *York*; where *Molton*, rector of the church of *South Collington*, in *Nottinghamſhire*, preferred a libel againſt *Machin* for ſubtraction of tithes. And the motion for the prohibition was grounded upon a ſuggeſtion, that *Machin* lived within the dioceſe of *Lincoln*, and therefore ought not to be cited out of the dioceſe where he lived, by 23 *H.* 8. *c.* 9. And the cauſe that Mr. *Bridges* ſhewed to the court, to diſcharge the rule, was, becauſe *Machin* had lands within the dioceſe of *York*, *viz.* in the pariſh of *South Collingham* in *Nottinghamſhire*; for tithes of corn growing upon which lands *Molton* libelled in the conſiſtory court of *York*; and when the citation was ſerved, *Machin* was there, though he lived generally within the dioceſe of *Lincoln*. And he cited Dr. *Blackmore*'s caſe, *Hardr.* 421. where it is ſaid by the court, that if a man be cited within the dioceſe, though he is not an inhabitant there, that this is not within the ſtatute of 23 *H.* 8. *c.* 9. But ſerjeant *Jenner* for the prohibition cited 1 *Roll. Rep.* 328. *Moor* v. *Cockain and Saunderſon*, where it is admitted, that if an executor living in the dioceſe of *A.* be ſued and cited in the dioceſe of *B.* where the will was proved, a prohibition ſhall be

be granted. But *per Holt* chief juſtice; If *A.* lives in the dioceſe of *B.* and occupies lands in the dioceſe of *C.* if *A.* ſubtracts tithes in *C.* he may be cited and ſued there; and it is not within the ſtatute of *Hen.* 8. for when *A.* occupies lands in *C.* that makes him an inhabitant there, and out of the intent of the ſtatute. And if a man has goods in the dioceſe of *A.* only, and he makes his will, and conſtitutes *B.* who lives in the dioceſe of *C.* his executor, and dies; *B.* proves the will in the court of the biſhop of *A.* *B.* may be cited in the dioceſe of *A.* for a legacy deviſed by this will, becauſe the reſidence of the executor does not give conuzance, but the probate of the will; to which *Rokeby* juſtice agreed. *Jenner* ſerjeant: The caſe in 1 *Roll. Rep.* 328. is *contra.* *Holt* ch. juſtice: Then it has been over-ruled ſeveral times ſince; and though that ſtatute was made to prevent vexation, yet there are ſeveral exceptions. *Adjournatur.*

And afterwards at another day Mr. *Bridges* againſt the prohibition argued, that if a prohibition ſhould be granted, there would be a failure of juſtice, becauſe *Molton* cannot maintain a ſuit in the court of the biſhop of *Lincoln* for the ſubtraction of theſe tithes. And Mr. *Broderick* of the ſame ſide ſaid, that the ſtatute of 32 *Hen.* 8. *c.* 7. which ſays, that perſons withdrawing tithes ſhall be convened before the ordinary of the place where they were withdrawn, will amount to a repeal of 23 *H.* 8. *c.* 9. if it had been within the intent of the ſaid act, which he ſaid was never intended. But *Jenner* ſerjeant cited 13 *Co.* 6. *Porter* v. *Rocheſter.* *Palm.* 488. *Hob.* 185. *Jones* v. *Jones*, 1 *Roll. Rep.* 328. And as to ſuits upon wills, they might tranſmit them to the dioceſe where the party lives. [See *Godb.* 191. *Frances* v. *Powell.*] And that civilians had told him, that they can ſue a man in the ſpiritual court of the dioceſe where he reſides, for tithes which he ought to pay for lands in another dioceſe.

But

But to that *Broderick* ſaid, that a ſuit for tithes was local: and for that he cited 1 *Keb.* 481. *Rogers* v. *Harding*. But *per Holt* chief juſtice: The ſtatute 32 *Hen.* 8. *c.* 7. did not intend to repeal any part of 23 *H.* 8. *c.* 9. but the queſtion is here, whether there is any remedy in *Lincolnſhire* for this ſubſtraction of tithes within the dioceſe of *York*? The civil law courts may tranſmit any cauſe into another civil law court, and ſo they every day do for cauſes ariſing in the admiralty of *France*. But here the queſtion is, whether the juriſdiction aroſe from the cauſe, or from the perſon; if a will be proved in the prerogative court of *Canterbury*, a ſuit upon it for a legacy, *&c.* muſt be in the *Arches*, which is the provincial court, though the party lives in another dioceſe; ſee the ſaving of the ſtatute 23 *Hen.* 8. *c.* 9. for that *adjournatur*. And afterwards a prohibition was granted, to the end that the parties ſhould declare upon it; ſo that the queſtion might come more judicially before the court.

Afterwards in *Hilary* term, the plaintiff declared in attachment upon the prohibition, *&c.* and Mr. *Broderick* argued for the defendant, that the words of the 23 *Hen.* 8. *c.* 9. are general, *viz.* That a man ſhall not be cited out of the dioceſe or peculiar, where he ſhall be dwelling; but that reſtraint ought to be limited to ſuch caſes only, where the juriſdiction, within which the party dwells, hath conuſance of the cauſe, for which the party is cited out of the dioceſe; for if it were otherwiſe, the ſubſtraction of tithes in this caſe would be diſpuniſhable. A dioceſe is a juriſdiction, and not the deſcription of a place as terminated by metes and bounds. And therefore in this caſe the party cannot be ſaid to be cited out of his dioceſe, becauſe no remedy could be had againſt him there; and therefore as to that he is not within the dioceſe. This notion appears by the caſes in 1 *Roll. Rep.*

328. *Cro. Car.* 97. 13 *Co.* 4. So if a peculiar is in two dioceſes, and a man who dwells in one of the dioceſes in the peculiar, is cited to the court of the peculiar held in the other dioceſe; that is not a citing out of the dioceſe, becauſe it is within the peculiar. 1 *Roll. Rep.* 329. Therefore ſince in this caſe the tithes aroſe within the dioceſe of *York*, he is not cited out of the juriſdiction, nor conſequently out of the dioceſe. For by the ſtatute of 32 *Hen.* 8. *c.* 7. The ſubſtraction of tithes is made local; for by the words of the act the party offending ſhall and may be cited before the eccleſiaſtical judge of the place, where ſuch wrong ſhall be done. In *Winch Entr.* 570. there is a ſuggeſtion for a prohibition, for proceeding before the archbiſhop, where the cauſe was tranſmitted by letters of requeſt; becauſe by the ſtatute 5 & 6 *Ed.* 6. *c.* 4, proceeding againſt brawlers in churches and churchyards, is limited to be before the ordinary of the place where the offence ſhall be done. The caſe in 1 *Keb.* 481. is a caſe in point. And in the caſe of 2 *Roll. Rep.* 448. the tithes are laid to have ariſen within the peculiar. There is a caſe in 3 *Mod.* 211. where it is held, that a taxation in another dioceſe is local, and will ſubject a man to be cited there (it is ſaid by inference); much more will tithes ſubject a man, for they will make a man an inhabitant to many purpoſes. *Jenner* ſerjeant *e contra* for the plaintiff. The words of the act are expreſs for the prohibition, and ſuit for tithes is mentioned in the preamble. And there is an opinion in point 2 *Brownl.* 28. confirming the generality of the words of the act; and there is no authority againſt it. There is alſo a caſe of a legacy in 2 *Brownl.* 12. and for words 191. [but of perſonal things there is no doubt.] It is a rule in the canon law, that *forum ſequitur reum*, and the caſes in 1 *Roll. Rep.* 328. and 1 *Cro.* 97. are ſtrong caſes for the plaintiff.

The

The court awarded a conſultation; becauſe by he ſtatute of 32 *Hen.* 8. *cap.* 7. *ſect.* 2. the ſuit or withholding of tithes in expreſs words is appointed to be before the ordinary of the place where the wrong was done. But if it had been in another caſe, it had been within the 23 *Hen.* 8. *cap.* 9. and the prohibition ſhould have continued. *Ld. Raym.* 452, 453. 534, 535. *Eaſt.* 11 *Will.* 3. *Machin* v. *Molton.*

A vicar libels for tithes; upon denial of it to be a vicarage a prohibition granted.

The ſequeſtrator of the tithes of a vicarage ſued the impropriator in the ſpiritual court for tithes upon the endowment. And the defendant moved here for a prohibition upon a ſuggeſtion, that it was not a vicarage, and that that ought to be tried at Common law. *Holt* Ch. Juſtice ſaid, that the ſuggeſtion is good in point of law; but if the ſuggeſtion appears to the court to be notoriouſly falſe, the King's Bench will not grant a prohibition; for they ought to examine into the truth of the ſuggeſtion, and ſee what foundation it hath; for if it appears plainly to be falſe in fact, the King's Bench ought not to grant a prohibition. *Hob.* 66. *Aſton* v. *Caſtle-Birmidge*; and it is held there, that though the ſurmiſe be matter of fact, and triable by a jury, yet it is in the diſcretion of the court to deny a prohibition. So it was done *Hob.* 185. *Jones* v. *Jones.* But at laſt in this caſe a prohibition was granted by conſent, and iſſue to be taken, vicarage or not, and to be tried at the next aſſizes, to ſettle the right. Note Mr. *Bury* ſhewed in this caſe a copy of an endowment, and of the book of firſt fruits where the vicarage was rated at and receipts for firſt fruits. *Ld. Raym.* 587. *Trin.* 12 *Will.* 3. *Smith* v. *Wallet.*

No prohibition if the ſuggeſtion is falſe.

CHAP. IX.

Of Leaſes of Tithes for lives or years by eccleſiaſtical perſons.

LEASE ſignifieth a demiſe or letting of lands or tenements, or right of common, or of a rent on any hereditament, unto another for term of years, or of life, for a rent reſerved. *Cowell.*

As to leaſes made by eccleſiaſtical perſons by the Common law, we ſhall but briefly obſerve, That all eccleſiaſtical perſons had in former times as full power and authority to leaſe, grant, or alien their poſſeſſions, as temporal perſons had, that is, if the grant, *&c.* made by a ſole corporation was with the conſent of others, whoſe confirmation was in ſuch caſe neceſſary; for though deans and chapters, maſters and fellows of colleges, maſters and brethren of hoſpitals, and ſuch like corporations aggregate, might of themſelves alone, without the conſent or confirmation of any, have made long leaſes for lives or years, or gifts in tail or fee, at pleaſure; yet biſhops, deans, *&c.* ſeiſed in right of their biſhopricks, deanries, *&c.* ſo archdeacons, prebendaries, parſons, vicars, *&c.* if they alien or leaſed, muſt have had the conſent and confirmation of others, that had the power of confirming in that behalf, and then their grants, *&c.* were as good as thoſe made by aggregate corporations. *Compl. Incumb.* 415.

But the law, as to the capacity of clergymen in granting, leaſing, *&c.* being greatly altered by diverſe acts of parliament, and thoſe not a little intricate and perplexed, it will be neceſſary to ſet down the ſtatutes themſelves, to render the caſes reducible to them more clear and intelligible.

The firſt ſtatute concerning leaſes by eccleſiaſtical perſons, which is alſo the only ſtatute that gives direc-

directions concerning leaſes by tenant in tail, or huſbands ſeized of lands in right of their wives, is 32 *Hen.* 8. *cap.* 28. which provides as followeth: Stat. 32 *Hen.* 8. c. 28.

"Where great numbers of the king's ſubjects have heretofore taken leaſes of lands, tenements and hereditaments, for term for years, and divers of them for term of life, and have given and paid great fines and ſums for the ſame, and alſo been at great coſts and charges, as well in and about great reparation and buildings upon their ſaid farms, as otherwiſe concerning their ſaid farms; yet notwithſtanding the ſaid farmers, after the deaths or reſignation of their leſſors, have been, and be daily, with great cruelty, expulſed and put out of their ſaid farms and takings by the heirs or ſucceſſors of their ſaid leſſors, or by ſuch perſons as have intereſt therein, after the deaths or reſignation of their ſaid leſſors, by reaſon of privy gifts of intail, or for that the leſſors had nothing in the lands, tenements or other hereditaments ſo letten at the time of the leaſes thereof made, but only in the right of their wives, or ſuch other like cauſe, to the great impoveriſhment, and in a manner utter undoing, of the ſaid farmers; for reformation whereof, Be it enacted, *&c.* That all leaſes to be made of any lands, tenements or other hereditaments, by writing indented, under ſeal, for terms of years, or for term of life, by any perſon or perſons, being of full age of twenty-one years, having an eſtate of inheritance either in fee-ſimple or in fee-tail, in their own right, or in right of their churches and wives, or jointly with their wives, of an eſtate of inheritance, made before the coverture or after, ſhall be good and effectual in the law againſt the leſſors, their wives, heirs and ſucceſſors, and every of them. *&c. Provided*, That the ſaid act ſhall not extend to any leaſes to be made of any manors, lands, tenements or hereditaments, being in the hands of any farmer or farmers, by virtue of any

Leaſes made by tenant in tail, or by him who is ſeiſed in right of his wife or church, &c.

old leaſe, unleſs the ſame old leaſe be expired, ſurrendered or ended, within one year next after the making of the ſaid new leaſe; nor ſhall extend to any grant to be made of any reverſion of any manors, lands, tenements or hereditaments, which have not moſt commonly been letten to farm, or occupied by the farmers thereof, by the ſpace of twenty years next before ſuch leaſe thereof made; nor to any leaſe to be made without impeachment of waſte, nor to any leaſe to be made above the number of twenty-one years, or three lives at the moſt, from the day of the making thereof; and that upon every ſuch leaſe there be reſerved yearly, during the ſame leaſe, due and payable to the leſſors, their heirs and ſucceſſors, to whom the ſame lands ſhould have come after the deaths of the leſſors, if no leaſe had been thereof made, and to whom the reverſion thereof ſhall appertain, according to their eſtates and intereſts, ſo much yearly ferm or rent, or more, as hath been moſt accuſtomably yielded or paid for the manors, *&c.* ſo to be letten within twenty years next before ſuch leaſe thereof made; and that every ſuch perſon or perſons, to whom the reverſion of ſuch manors, *&c.* ſo to be letten ſhall appertain, as is aforeſaid, after the death of ſuch leſſors or their heirs, ſhall and may have ſuch like remedy and advantage, to all intent and purpoſes, againſt the leſſees thereof, their executors and aſſigns, as the ſame leſſor ſhould or might have had againſt the ſame leſſees; *Provided* alſo, That this act extend not to give any liberty or power to any perſon to take any more farms, leaſes or takings, of any manors, *&c.* than he ſhould or might lawfully have done before the making of this act; nor extend to any liberty or power to any parſon or vicar of any church or vicaridge, for to make any leaſe or grant of any of their meſſuages, lands, tenements, tithes, profits or hereditaments, belonging to their churches or vicaridges,

ridges, otherwiſe, or in any other manner, than they ſhould or might have done before the making of this act."

This act extends only to ſole corporations, as biſhops, deans, *&c.* but as to corporations aggregate, as deans and chapters, *&c.* though they be ſeiſed in right of their churches, this is no enabling ſtatute; for they, by the conſent of the major part of them, might have made any leaſes or grants of their eſtates without limitation before this ſtatute, and ſo they might have done after, till by other ſubſequent ſtatutes they were reſtrained; this being merely enabling, and not at all reſtraining them; and though by this ſtatute the ſole corporations before mentioned could not, without the conſent and confirmation of others, have made leaſes for three lives, or twenty-one years, yet with confirmation they might have made longer leaſes, or abſolute alienations, of any of their poſſeſſions; and therefore to reſtrain biſhops, and other eccleſiaſtical perſons, were the ſtatutes of 1 & 13 *Eliz.* made, which are as follow. 10 Co. 60. a.

For reſtraining of biſhops, the ſtatute 1 *Eliz.* *cap.* 29. enacts, "That all gifts, grants, feoffments, fines and other conveyances, or eſtates, from the firſt day of this preſent parliament had, made, done or ſuffered, or to be had, made, done or ſuffered, by any archbiſhop or biſhop, of any honours, caſtles, manors, lands, tenements or other hereditaments, being parcel of the poſſeſſions of his archbiſhoprick or biſhoprick, or united, appertaining, or belonging to any of the ſame, to any perſon (other than the queen, her heirs and ſucceſſors) whereby any eſtate ſhould or might paſs from the archbiſhop or biſhop, other than for term of twenty-one years, or three lives, from ſuch time as any leaſe, grant or aſſurance, ſhall begin, and whereupon the old accuſtomed yearly rent, or more, ſhall be reſerved payable yearly, during the ſaid term of Moor 107.

twenty-one years, or three lives, ſhall be utterly void; any law, cuſtom, &c. notwithſtanding."

Other than the queen, her heirs and ſucceſſors] This ſtatute leaving biſhops their former power of granting to the queen, her heirs and ſucceſſors, to little effect, for that many eſtates were granted to the queen, upon deſign that ſhe ſhould grant them over to others; to prevent which was the ſtatute 1 *Jac.* 1. *cap.* 3. made, which diſables all archbiſhops and biſhops from granting any of their poſſeſſions to the king, his heirs or ſucceſſors, and makes all ſuch leaſes, grants, &c. to the king, his heirs or ſucceſſors, utterly void and of none effect. 11 *Co.* 71. *Gibſ. Cod.* 679.

The ſtatute which diſables all other eccleſiaſtical perſons is 13 *Eliz. cap.* 10. which is as followeth: "And for that long and unreaſonable leaſes made by colleges, deans and chapters, parſons and vicars and others, having ſpiritual promotions, be the chiefeſt cauſes of the dilapidations and the decay of all ſpiritual livings and hoſpitality, and the utter impoveriſhing of all ſucceſſors, incumbents of the ſame; Be it enacted, That from henceforth all leaſes, grants, feoffments, conveyances or eſtates, to be made, had, done or ſuffered, by any maſter and fellows of any college, dean and chapter of any cathedral or collegiate church, maſter or guardian of any hoſpital, parſon, vicar, or any other, having any ſpiritual or eccleſiaſtical living, or any houſe, lands, tithes, tenements or other hereditaments, being any parcel of the poſſeſſions of any ſuch college, cathedral, church, chapel, hoſpital, parſonage, vicaridge, or other ſpiritual promotion, or any ways appertaining or belonging to the ſame, or any of them, to any perſon or perſons bodies politick or corporate (other than for the term of twenty-one years, or three lives, from the time as any ſuch leaſe or grant ſhall be made or granted; whereupon the accuſtomed yearly rent,

or more, ſhall be reſerved, and payable during the ſaid term) ſhall be utterly void, and of none effect, to all intents and purpoſes whatſoever; any law, cuſtom, &c. notwithſtanding; *Provided*, &c. that nothing herein extend to make good any leaſe, or other grant, to be made by any ſuch college or collegiate church within either of both the univerſities of *Oxford* and *Cambridge*, or elſewhere, within the realm of *England*, for more years than are limited by the private ſtatutes of the ſame college: *Provided* alſo, That this act ſhall not extend to any leaſe hereafter to be made upon ſurrender of any leaſe hereafter made and now continuing, ſo that the leaſe to be made do not contain more than the reſidue of the years of the former, now continuing, ſhall be at the time of ſuch leaſe hereafter to be made, nor any leſs rent than is reſerved in the ſaid former leaſe."

On theſe ſtatutes we ſhall obſerve, 1. That the ſtatute of 1 *Eliz. cap.* 19. is but a private or particular ſtatute, and muſt be ſpecially pleaded, elſe the court will take no notice of it; but 13 *Eliz. cap.* 10. is a general law, whereof the judges are bound *ex officio* to take notice, though it be not pleaded, becauſe it extends to all eccleſiaſtical perſons whatſoever, except biſhops, who were before provided for by the 1 *Eliz. cap.* 19. 3 *Co.* 2. 4 *Co.* 76. *Moor* 253. *Cro. Jac.* 112. 2 *Rol. Abr.* 466. 1 *Leon.* 306. *Yelv.* 106. 1 *Mod.* 205. 2 *Mod.* 56.

2. It has been adjudged and held in parliament, that the king was bound by 13 *Eliz. cap.* 10. though not named, becauſe the ſtatute was general and for the public good; but for ſome time the law was held otherwiſe, and therefore where a leaſe was made to the king by a dean and chapter, and the king had aſſigned it over; after that, the law came to be held that the king was bound, the aſſignee had his leaſe made good to him

in

in Chancery againſt the ſtatute, becauſe he could not know the law in a matter ſo dubious. *5 Co.* 15. *b.* *11 Co.* 75. *1 Rol. Abr.* 378. *1 Rol. Rep.* 151.

3. That all leaſes made according to *13 Eliz.* by any ſingle corporation, if not warranted likewiſe by *32 H.* 8. muſt be confirmed by thoſe who by law are to confirm the ſame. *Comp. Incumb.* 417.

4. That theſe ſtatutes of the *1 & 13 Eliz.* are merely reſtraining, ſo that though biſhops and other eccleſiaſtical perſons might, with the confirmation of thoſe required by law, have made any leaſe or perpetual grant, yet now no confirmation whatever will make them good for above three lives, or twenty-one years. *Comp. Incumb.* 419.

5. That no leaſe by any archbiſhop or biſhop for three lives, or twenty-one years, made according to the exception of *1 Eliz.* is good to bind the ſucceſſor, or if it be not in every thing purſuant to *32 H.* 8. unleſs it be confirmed by the dean and chapter; for leaſes for twenty-one years, being only exempted and taken out from the general diſability impoſed on biſhops by the firſt part of the act, receive no ſanction at all from that act, but as they are taken out to reſt upon *32 H.* 8. and therefore though they are for twenty-one years, or three lives; yet if part of the land were not in poſſeſſion, or that the old leaſe were not ſurrendered or expired within one year before the new leaſe made, or in any other reſpect, ſuch new leaſe were not warranted by *32 H.* 8. to bind the ſucceſſor, there muſt be the confirmation of the dean and chapter; becauſe at Common law ſuch confirmation was neceſſary; and theſe leaſes not being warranted by *32 H.* 8. which is the only ſtatute that enables biſhops ſolely to make leaſes to bind their ſucceſſors, remain at Common

mon law, and by conſequence, without confirmation, are voidable by the ſucceſſors as much as if they were made for one hundred years or lives. 10 *Co.* 60. *b.* *Co. Lit.* 45. *a.* *Moor* 108.

6. That 13 *Eliz. cap.* 10. hath been always conſtrued largely and beneficially to prevent all inventions and evaſions againſt the true intent thereof; therefore where the ſtatute ſays, maſter and fellows of any college, yet it hath been often held, that be the college incorporated by that name, or by the name of the warden and fellows, or warden and ſcholars, or warden, fellows and ſcholars, or maſter, fellows and ſcholars, or maſter and ſcholars, or provoſt, fellows and ſcholars, or by any other name of corporation, and be the college temporal for the advancement of the liberal arts and ſciences, or merely eccleſiaſtical or mixt, that all theſe are within the reſtraint of this act; ſo where the ſtatute ſays maſter or wardens of any hoſpital, be the hoſpital incorporated by any other name, and be it a ſole corporation aggregate of many, yet the ſtatute extends to them. 11 *Co.* 76. *Magdalen College*'s caſe.

The next ſtatute that made any alteration in theſe things was 14 *Eliz.* which as to houſes in cities and great towns is as followeth: "Whereas in an act made 13 *Eliz.* there is no branch to avoid certain leaſes to be made by maſters and fellows of colleges, deans and chapters of cathedral or collegiate churches, maſters or guardians of any hoſpitals, or by any parſon or vicar, or any other having any ſpiritual or eccleſiaſtical living; Be it Enacted, That the ſaid branch, nor any thing therein contained, ſhall not extend to any grant, aſſurance or leaſe of any houſes belonging to any perſons or bodies politick or corporate aforeſaid, nor to any grounds to ſuch houſe appertaining, which houſes be ſituate in any city, borough, town corpo-

corporate or market town, or the ſuburbs of any of them; but that all ſuch houſes and grounds may be granted, demiſed and aſſured as by the laws of this realm and the ſeveral ſtatutes of the ſaid colleges, cathedral churches and hoſpitals they lawfully might have been before the making of the ſaid ſtatute, or lawfully might be, if ſuch ſtatute were not, ſo always that ſuch houſe be not the capital or dwelling-houſe uſed for the habitation of the perſons above-ſaid, nor have ground to the ſame belonging above the quantity of ten acres; Provided, That no leaſe ſhall be permitted to be made by force of this act in reverſion, nor without reſerving the accuſtomed yearly rent at the leaſt, nor without charging the leſſee with the reparations, nor for longer than forty years at the moſt; nor any houſes ſhall be permitted to be aliened, unleſs in recompence thereof there ſhall be good and ſufficient aſſurance made in fee-ſimple abſolutely to ſuch colleges, houſes, bodies politick or corporate, and their ſucceſſors, of lands of as good value, and of as great yearly value at the leaſt, as ſhall be aliened; any ſtatute to the contrary notwithſtanding.

Comp. Incumb. 423. *Note*; This ſtatute makes no alteration of the ſtatute 1 *Eliz.* nor has any relation to it, but only to the ſtatute 13 *Eliz.* and therefore gives no power to biſhops to let houſes, otherwiſe than according to 1 *Eliz.*

Co. Eliz. 564. *Note alſo*, That this ſtatute need not be found by verdict, being a general law.

By this ſtatute it is expreſly provided, that no leaſe ſhall be made of ſuch houſes in reverſion; but by 13 *Eliz.* no reſtraint being made of ſuch leaſes, it was found neceſſary to provide againſt them by another

other ſtatute, *viz.* the 18 *Eliz.* which reciting, That ſince the making of the 13 *Eliz.* divers eccleſiaſtical and ſpiritual perſons, and others having ſpiritual or eccleſiaſtical livings, have from time to time made leaſes for a term of twenty-one years, or three lives, long before the expiration of the former years, contrary to the true intent and meaning of the ſaid ſtatute; "Be it therefore enacted, That "all leaſes to be made by any eccleſiaſtical, ſpiri- "tual, or collegiate perſons, or others, of any of "the ſaid eccleſiaſtical, ſpiritual, or collegiate "lands, tenements, or hereditaments whereof any "former leaſe for years is in being, not to be ex- "pired, ſurrendered, or ended within three years "next after the making of any ſuch new leaſe, ſhall "be void, fruſtrated, and of none effect; and that "all and every bond and covenant for renewing "or making of any leaſe or leaſes contrary to the "true intent of this act, or of the ſaid act made "in the ſaid 13th year, ſhall be utterly void; any "law, ſtatute, *&c.* Provided, that this act, nor any "thing therein contained, ſhall extend or be pre- "judicial to make fruſtrate or void any leaſe or "leaſes heretofore made by any of the ſaid ſpiri- "tual or eccleſiaſtical perſons, or any of them; "but that the ſame, and every of them, are of "the like force and effect, as they, or any of "them, were before the making of this preſent "ſtatute."

The ſtatute of 18 *Eliz.* has relation only to the ſtatute 13 *Eliz.* to reſtrain leaſes in reverſion where above three years of the firſt leaſe is then to come, but leaves the ſtatute of 14 *Eliz.* perfectly at large as to houſes in cities, without making void ſuch leaſes, or any bonds or covenants concerning them; for as to ſuch houſes the ſtatute of 14 *Eliz.* is a new law, and ſets looſe the 13 *Eliz.* therefore where an action of covenant was brought againſt the dean of *Lincoln* and one of the prebendaries, upon

Hob. 269. *Crane* v. *Taylor.*

upon a covenant made by the dean and chapter, by their ſpecial names jointly and ſeverally, to make a leaſe of a houſe in *London*, though it was argued to be void upon the ſtatute 18 *Eliz.* that ſtatute extending only to 13 *Eliz.* and not to the 14 *Eliz.* which, as to houſes in cities, repealed 13 *Eliz.* and makes all leaſes thereof good, ſo they do not exceed forty years, *&c.* and are not made in reverſion, which was not prohibited by 13 *Eliz.* alſo the ſtatute 14 *Eliz.* forbids alienations of ſuch houſes, except there be full recompence given to the church at the ſame time, ſo as with ſuch recompence they may alien ſuch houſes in fee, which was not permitted by 13 *Eliz.* and it was adjudged accordingly; and it is ſaid, the reaſon of repealing 13 *Eliz.* as to houſes in market-towns, was to make thoſe places more populous.

1 *Vent.* 245.

Moor 789. *Dean and Canons of Windſor* v. *Sir Gilbert Perwin.*

But to avoid the force of thoſe ſtatutes of 13 *Eliz.* and 18 *Eliz.* and the clauſe making void bonds and covenants againſt them, a contrivance was ſet on foot to this effect; the dean and chapter of *Windſor*, in the 35th year of *Eliz.* made an agreement amongſt themſelves by lots to have an aſſurance of a leaſe to each of them, of certain part of the poſſeſſions of their church, which, after the lots caſt, whereby every one knew his own leaſe, they executed the aſſurance in this manner; The corporation enters into an obligation of 500 *l.* to every canon that was to have a leaſe, and the payment limited to be within a ſhort time before the expiration of the old leaſe in being, and the canon the ſame day entered into an obligation to pay the college 510 *l.* at the ſame time, if they did make a leaſe according to a ſchedule annexed, which ſchedule was *verbatim* the demiſe agreed to be made; and it was farther proved, that the intent and agreement betwixt them was, that the one 500 *l.* ſhould be ſtopped for the other 500 *l.* and that the corporation ſhould have only the 10 *l.*

for

for the leaſe; which matter being diſcloſed in chancery, the lord keeper *Egerton* made a decree, that the obligation of 500 *l.* made by the dean and canons to each canon was void by 18 *Eliz.* and in the ſame caſe a precedent was ſhewn between *Fry* and the dean and canons of *Wells*, decreed 44 *Eliz.* in chancery, which was thus; *Fry* gave to the dean and canons of *Wells* 1000 *l.* and took an obligation of 2000 *l.* with condition to repay the 1000 *l.* and for nonpayment brought an action of debt againſt the dean and prebends, and obtained a judgment, and made a defeazance thereof, that if they make a leaſe to him of land then in leaſe to Sir *Amias Pawlett* for fifteen years to come, then the judgment ſhould be void; and the truth of the caſe was, that the 1000 *l.* was paid, and 600 *l.* thereof employed in payment of tenths due by the church; yet by the opinion of *Popham*, *Anderſon* and *Periam*, it was decreed in chancery, that the judgment was void by 18 *Eliz.* which makes void bonds and covenants for making leaſes againſt that ſtatute, or 13 *Eliz.* *c.* 10; but by way of arbitrament they awarded to *Fry* the 600 *l.* that was paid and employed in the affairs of the church, and after the 43 *Eliz.* was made to extend to judgments in ſuch caſes.

Another ſtatute concerning leaſes made by colleges of *Wincheſter* and *Eaton*, is 18 *Eliz.* which adds one thing more, as followeth; "That no "maſter, provoſt, preſident, warden, dean, go- "vernor, rector, or chief ruler of any college, ca- "thedral church, hall, or houſe of learning in "any of the univerſities of *Cambridge* and *Oxford*, "nor any provoſt, warden, or other head officer "of the colleges of *Wincheſter* or *Eaton*, nor the "corporation of any of the ſame, by what title, "ſtile, or name ſoever they now be, ſhall, or may "be called, after the end of this preſent ſeſſion of "parliament, ſhall make any leaſe for life, lives

"or

" or years, of any farm, or any other land, te-
" nements, or other hereditaments, to the which
" any tithes, arable land, meadow or paſture doth
" or ſhall appertain, except that the one third part
" at leaſt of the old rent be reſerved in corn for
" the ſaid colleges, cathedral churches, halls, and
" houſes; that is to ſay, in good wheat, after the
" rate of 6 *s.* and 8 *d.* the quarter, or under, and
" good malt at 5 *s.* the quarter, or under, to be
" delivered yearly upon a day prefixed at the ſaid
" colleges, cathedral church, halls or houſes; and
" for default thereof to pay to the ſaid colleges,
" cathedral church, halls or houſes, in ready mo-
" ney, at the election of the ſaid leſſees, their exe-
" cutors, adminiſtrators and aſſigns, after the rate
" of the beſt wheat and malt in the market of
" *Cambridge*, for the rents that are to be paid to the
" uſe of the houſe or houſes there, (and ſo for *Ox-*
" *ford* and *Wincheſter*, *in totidem verbis*,) and in the
" market of *Windſor*, for the rents that are to be paid
" to the uſe of the houſe or houſes at *Eaton*, is or
" ſhall be due, without fraud or deceit; and that
" all leaſes otherwiſe hereafter to be made, and all
" collateral bonds or aſſurances to the contrary by
" any of the ſaid corporations, ſhall be void in
" law, to all intents and purpoſes; the ſame wheat,
" malt, or money coming of the ſame, to be ex-
" pended to the uſe of the relief of the commons
" and diet of the ſaid colleges, cathedral church,
" halls and houſes only, and by no fraud or co-
" lour, let or ſold away from the profit of the
" ſaid colleges, cathedral church, halls and houſes,
" and the fellows and ſcholars in the ſame, and
" the uſe aforeſaid, upon pain of deprivation of
" the governor and chief rulers of the ſaid col-
" leges, cathedral church, halls and houſes, and all
" other thereunto conſenting: but that this act, or
" any thing therein contained, ſhall not extend or
" be any wiſe prejudicial to any leaſe to be made

" of

" of a barn called *Muncken Barn*, with a certain por-
" tion of tithes, riſing, growing, and being in the
" pariſh of *Southwerk* in the county of *Suſſex*, be-
" ing parcel of the poſſeſſions of *Maudlin College*
" in *Oxford*, ſo that the term demiſed in and by
" the ſaid leaſe exceed not the number of ten years
" from and after the feaſt of Saint *Michael the*
" *Archangel* next coming; neither ſhall this act ex-
" tend to any leaſe to be made by the preſident
" and ſcholars of the college of St. *John Baptiſt*
" in *Oxford*, to any heir male of Sir *Thomas White*,
" founder of the ſaid college, which leaſe ſhall be
" made according to the meaning of the founda-
" tion and ſtatutes of the ſaid college, of the
" manor of *Fifield*, and no other hereditaments."

In the conſtruction of this ſtatute it hath been holden, that it is a private act, becauſe it concerns only thoſe particular places; and therefore muſt be pleaded or given in evidence, or found by a jury, otherwiſe the court is not bound to take notice of it. 1 *Leon.* 306. *Sav.* 129.

Alſo it is ſaid, that in a declaration upon a leaſe made by any of theſe colleges it ought to be ſhewed, that the corn was reſerved according to the ſtatute, otherwiſe this may be good cauſe to move in arreſt of judgment; but of this it may be doubted; for in the caſe itſelf, cited in *Leon.* for that purpoſe, it appears that that exception was diſallowed; for though it does not appear in the declaration that corn was reſerved, yet it may be that it was reſerved in the leaſe; and if not, yet the other party ought to ſhew it; and therefore the exception to the declaration for not ſhewing it was diſallowed. 1 *Leon.* 306, 333. *Sav.* 129.

By the ſtatute 22 *Car.* 2. it is enacted, " That
" for ever hereafter, the mayor, commonalty, and
" citizens of *London* may and ſhall have a market,
" to be kept three or four days in the week, as to

" them ſhall ſeem convenient, upon the ground " now ſet out by the aſſent of the dean and chap- " ter of the cathedral church of Saint *Paul*, *Lon-* " *don*, for a market place within *Newgate*, and " that the ſaid dean and chapter ſhall make and " give one or more leaſe or leaſes of the ſaid " ground to the ſaid mayor, commonalty, and ci- " tizens, and alſo of the wall of the ſaid church- " yard, abutting ſeverally upon *Pater-noſter-row* " and the *Old Change*, for the term of forty years, " reſerving the yearly rent of four pounds for that " ground of the ſaid market-place, and two-pence " for every ſuperficial foot of the ground or ſoil " of the ſaid wall, as it is now ſet out by the ſur- " veyor of the city and of the ſaid dean and chap- " ter, and ſo from forty years for ever, at the like " yearly rent, and one year's rent, after the rates " aforeſaid, to be paid by way of fine for each of " the ſaid grounds reſpectively, upon the making " every new leaſe thereof; which ſaid leaſe and " leaſes ſhall be good and effectual in the law, as " againſt the dean and chapter, and their ſucceſ- " ſors, and all perſons claiming by, from, or un- " der them; and that no houſe, ſhed, or other " buildings ſhall ſtand, or hereafter be erected and " fixed upon the ſaid market-place, other than the " market-houſe already built with the conſent of the " ſaid dean and chapter; any thing in this, or any " other act to the contrary notwithſtanding: And " whereas the ſaid parſons or vicars, or ſome of " them, (within the ſaid city of *London*) are inte- " reſted in ſeveral glebe-lands or grounds, the " which they cannot rebuild themſelves, nor let " ſuch leaſe or leaſes as may be an encouragement " to others to rebuild the ſame; Be it enacted, " that the ſaid parſons and vicars, and every of " them reſpectively, be impowered, and are here- " by impowered to let ſuch leaſe or leaſes, or their " ſaid glebe-lands or grounds, with the conſent

" and

" and approbation of the patron or patrons, and " ordinary, for a term not exceeding forty years, " and at ſuch yearly rents, without fine, as can " be obtained for the ſame."

Before we mention any caſes, or make any obſervations on the foregoing ſtatute, it may be neceſſary to take notice, that at Common law, if a parſon had made a leaſe for years of his glebe-land, to begin after his death, or grant a rent-charge in that manner, and ſuch leaſe or grant were confirmed by the patron and ordinary, this would have bound the ſucceſſor of the parſon; becauſe here was the conſent and concurrence of all perſons intereſted, and the leaſe or charge bound immediately from the perfecting of the deed by the parſon, patron and ordinary, though it was not to take effect in poſſeſſion till after the parſon's death; but now no confirmation whatever ſhall make ſuch leaſe or grant good againſt the ſucceſſor, by reaſon of the ſtatutes made to avoid them. *Dyer 69. a. Hob. 7. 1 Rol. Rep. 445.*

If a perſon obtain a grant to build houſes on church or college lands, this is confirmed (in caſes where confirmation is neceſſary,) yet this grant is no alienation againſt the ſtatutes, but is only a covenant or licence, and nothing elſe; for the ſoil remains in the grantor, and by conſequence the houſes built thereon are in him. *Hal. 571*

If a pariſh be upon the deſign of incloſing lands, and a perſon hath tithes in kind, and common for beaſts thereout, the chancery may decree him to take a quantity of ground elſewhere, in lieu thereof. *Comp. Incumb. 334*

So where one had a leaſe of tithes in kind, it was ordered in chancery, that a commiſſion ſhould go forth to ſet out other meadow and ground in lieu thereof, the reaſon of which caſes ſeems to be, either for the prejudice the publick might ſuffer, if ſuch recompence in no caſe ſhould be allowed, or for that the ſucceſſor of the parſon have no in- *Comp. Incumb. 334*

jury thereby, being recompenced in other lands; *ſed quære* why an act of parliament in ſuch caſes ought not to be procured; for it ſhould ſeem the chancery, as well as the other courts, are bound by all acts of parliament, which are poſitive laws, and have no liberty of breaking through them, upon any pretence of convenience or neceſſity, more than other courts.

Hob. 269. *Noy* 5. By the ſtatute of 14 *Eliz.* as appears before, all thoſe who were reſtrained by 13 *Eliz.* have liberty given them to alien houſes in cities abſolutely, ſo as at the time of ſuch alienation there be a recompence in lands given to them and their ſucceſſors, of as great value as the houſes aliened are; but this liberty of aliening, upon ſuch recompence to be given, extends only to houſes; for as to lands they have no ſuch power, nor can they change them, to bind their ſucceſſors, upon any recompence whatſoever; and *quære* whether ſuch houſe may be exchanged for lands of greater value, without licence, againſt the ſtatute of *Mortmain*.

1 *Sid.* 162. It is agreed, that corporations of mayor and commonalty, bailiffs and burgeſſes, and ſuch other lay corporations, are out of all the before mentioned ſtatutes, and may make leaſes, and other eſtates, as they might ever have done.

Degge 135. It hath been adjudged, that a ſpiritual perſon not beneficed is not within the 21 *H.* 8. *c.* 13. which prohibits ſpiritual perſons from taking leaſes to farm, *&c.* for life, years, or at will, in their own name, or in the name of any other perſon or perſons to his uſe, *&c.*

Dyer 27, 28, 338. *a.* 1 *Leon.* 309. 3 *Keb.* 436. A leaſe being made to a ſpiritual perſon againſt 21 *H.* 8. and a bond or obligation taken for performance of covenants, the obligee brought an action of debt upon this bond, and had judgment; which proves that the leaſe was not abſolutely void between the leſſor and leſſee, as the words of the ſtatute are; and though in *Dyer*, where this caſe is reported,

reported, this is not mentioned to be any cauſe of the judgment; yet *Periam* in 1 *Leon.* held it to be the greateſt cauſe of the judgment; and ſo it appears to have been adjudged in another place; for the ſtatute inflicts a penalty of 10 *l.* for every month that the clerk ſhall occupy ſuch farm, and therefore it cannot be void; but the leaſes made void by that ſtatute are only thoſe which ſpiritual perſons before that act, or after, had, and before *Michaelmas* then next following were not bargained, ſold, or granted away.

In an action upon 21 *H.* 8. *c.* 13. againſt a parſon for taking of farms, it is a good plea to ſay, *Non habuit ſeu tenuit ad firmam contra formam ſtatuti*, and the defendant may give in evidence, that the farm was for the maintenance of his houſe, *&c.* according to the proviſo in the ſtatute for that purpoſe. *Bro. tit. Action ſur le Stat. 2.*

Alſo the writ grounded on this ſtatute ought to be *qui tam* for the king and party; and therefore a writ, which demanded the whole, was ruled not to be good; but that ſtatute need not be mentioned in the writ. *Bro. Action ſur le Stat. 4.*

By another act intituled, *An act for erecting of hoſpitals, or abiding or working houſes for the poor*, it is (amongſt other things) provided, that all leaſes, grants, conveyances, or eſtates to be made by any corporation ſo to be founded, exceeding the number of twenty-one years, and that in poſſeſſion, and whereupon the accuſtomable yearly rent, or more, by the greater part of twenty years before the taking of ſuch leaſe, ſhall not be reſerved, and yearly payable, ſhall be void. *Stat. 39 Eliz. c. 5. ſect. 2.*

As to the parſons who may be ſaid to be ſeiſed in right of their churches, ſo as to be impowered by the ſtatute of 32 *H.* 8. to make leaſes for three lives, or twenty-one years, to bind their ſucceſſors, it appears to have been adjudged, though he be ſeiſed in right of his prebendary, and not in right of his church, *4 Leon.* 51. *Cro. Eliz.* 358. *Co. Lit.* 44. *b.* 3 *Bulſt.* 290. *Bro.* tit. *Leaſes* 9. *Palm.* 105. *Comp. Incumb.* 325.

church, may yet within the equity of that act make leaſes for three lives, or twenty-one years, to bind his ſucceſſors, obſerving the ſeveral qualifications required by the act; for the words of the act being general, all perſons having an eſtate of inheritance in right of their church, with a ſpecial exception of parſons and vicars only, ſhew the intent of the act to include and take in all but thoſe ſo excepted; and *Popham* ſaid, that in doctor *Dale*'s caſe, for an houſe near St. *Paul*'s, it was adjudged, and ſo had been twice adjudged in his experience; and *Fenner* ſaid, it was ſo adjudged in the caſe of a treaſurer of a church, and prebendaries are eccleſiaſtical perſons, for they are admitted and inſtituted, and have *locum in choro, & vocem in capella.*

1 *Lev.* 112. 2 *Sid.* 158. 1 *Keb.* 576. *Palm.* 105. So likewiſe it hath been adjudged, that a chancellor of a cathedral church may make leaſes for twenty-one years, or three lives, within this ſtatute, to bind his ſucceſſor; ſo of a treaſurer, archdeacon, and precentor; for they are prebendaries, and more, for they are generally choſen out of the prebendaries, and have thoſe dignities ſuperadded or annexed; and though chancellors and treaſurers are in ſome ſort miniſterial, yet are they not *inter minores ordines*, as the *oſtiarii* and *vergers* are, who are only ſervants to carry candles and wax, keep the doors, *&c.* but the others are ſeiſed in fee in right of their church, *&c.* and have moreover theſe dignities ſuperadded; but a caſe was cited to have been adjudged in the Exchequer, that leaſes made by the chanters of *St. Paul*'s muſt be confirmed; for it was ſaid, they are not properly chanters, but ſinging men only, and *minoris ordinis*; but chanters, properly ſo called, precentors, *&c.* are *majoris ordinis*; as the biſhop of *Sarum*, in right of his biſhoprick is *præcentor Angliæ*; which ſhews it to be honorary, and a ſpiritual dignity.

If

If a parſon, prebend, mayor, dean, abbot, &c. or any other ſole corporation make a leaſe for years, either upon theſe ſtatutes, or at Common law, though the leſſor be under the age of twenty-one years, yet he ſhall not avoid ſuch leaſe for that cauſe; for ſince they are admitted to exerciſe ſuch offices or functions, though within age, they are likewiſe by law ſuppoſed capable of doing all things belonging thereto, as other perſons of full age may do; and therefore ſuch acts as are done by them in their politick capacity, which is ſubject to no age or infirmity, as the body natural is, are valid and effectual, notwithſtanding their minority, which in ſuch caſe is not material. *Eccl.* tit. &c. 64, 80.

The firſt thing to be obſerved upon the ſeveral ſtatutes before mentioned concerning leaſes is, that as well upon the ſtatutes of the 1 & 13 *Eliz.* as upon 32 *H.* 8. the leaſes to be made by virtue thereof muſt be by indenture; for though the ſtatutes 1 & 13 *Eliz.* do not require it, yet in that and all other qualities and properties required by the 32 *H.* 8. (except concurrent leaſes only) they muſt follow the pattern thereof; and if the deed be indented, whether it begin *This indenture* or not, is not material; for notwithſtanding that, it is an indenture; and on the contrary, if it be not indented, the calling it an indenture will not make it ſo. *Co. Lit.* 44. *b.* 3 *Keb.* 379. 5 *Co.* 25. *Co. Lit.* 143. *a.* 129. *a.* *Cro. Eliz.* 472. 2 *Inſt.* 672. 2 *Roll. Abr.* 22.

But the moſt obſervable thing under this head is, how far a parol leaſe or agreement by the parſon with his pariſhioners or a ſtranger for his tithes ſhall be good, and how far and in what caſes not; concerning which there are various caſes and opinions in the books, many of which have no foundation from the ſtatute, but ſtand intirely on their own bottom. *Comp. Incumb.* 337, &c.

Godb. 374. 2 Rol. Abr. 63. Cro. Eliz. 188, 249. Perk. sect. 62. Cro. Jac. 317, 613. 10 Co. 92. 1 Leon. 23. 2 Brownl. 11, 17. 3 Keb. 376.

And herein all the books agree, that if a person leaſe or grant over his tithes to a ſtranger for life or years, or even for a year, that ſuch leaſe or grant muſt be in writing; and if it be not, it will be abſolutely void; the reaſon whereof is, becauſe tithes are things which lie meerly in grant, and whereof no manual occupation can be; till they are actually collected, they are not things ſubſtantive, whereof the property can be charged by the notoriety of livery and ſeiſin, or any actual taking of poſſeſſion; but their whole eſſence before they are ſevered and divided conſiſts only in notion and idea; therefore without deed the grantee or leſſee can make no manner of title to them; for without that, there is nothing can be done to inveſt him with the property thereof, but the eſſence and ſubſtance of his title is to be derived from the deed, granting or leaſing them to him; and for this reaſon it is, that he muſt not only have a deed thereof, but muſt alſo in pleading ſhew it with a *profert hic in curia*; for otherwiſe the court, which is to judge *ſecundum allegata & probata*, can no more adjudge his title good, than if he had no deed at all; but (*a*) yet if ſuch grant or leaſe be made of tithes without deed, and the grantee or leſſee ſues for them in the ſpiritual court, the defendant muſt plead that all the title that the plaintiff has is by leaſe without deed; nor can he ſuggeſt this matter to ground a prohibition on; but he ought either to ſet out his tithes without who hath the title to them, which will diſcharge him, or he ought to preſcribe *in modo decimandi*, and ſurmiſe, that the tithes belong to *J. S.* with whom he hath compounded to pay ſuch a ſum for all tithes.

(*a*) 1 Leon. 23.

2 Rol. Abr. 63. Latch 177. Bro. tit. Incidents, 7. tit. Leaſes, 15, 20. tit. Grants, 44.

But if a parſon leaſe his rectory or parſonage for years, in this caſe the tithes and offerings will paſs as incident to the rectory, though there be no deed, becauſe the rectory is the principal, and the leaſe of that being good without deed, the

 tithes

tithes and offerings, which are but as part of, or acceſſory to the rectory, muſt paſs likewiſe, though they are not named; and ſome hold, that by ſuch parol leaſe of the rectory the tithes will paſs, though there be no houſe, but only the church and church-yard.

If a portion of tithes have been long uſed with a chapel, by grant or leaſe of the chapel, with all the tithes thereunto belonging, this is a ſufficient deſcription to paſs the tithes, though generally a portion of tithes ought to be ſo named; but it does not appear whether in this caſe the grant or leaſe of the chapel were by deed or not. *Clayt. ſect.* 25. *Comp. Incumb.* 338.

As concerning leaſes of tithes to the pariſhioner himſelf, who ought to pay them, there are variety of opinions in the books, how far ſuch leaſes or agreements ſhall be good without writing, if they are made for the life of the parſon, or for years, or for one year only, and how far, and in what caſes, the aſſignee of the pariſhioner ſhall take advantage of, or be bound by ſuch leaſes or agreements.

Firſt then, moſt of the books agree, that if the parſon, in conſideration of ſuch a ſum then paid, or ſo much annually to be paid, by the pariſhioner, do contract or agree by parol with him, that he ſhall retain his tithes, or ſhall be diſcharged of the payment of his tithes during the life of the parſon, or for ſo many years as he ſhall be incumbent, that is void, and the reaſon given is, becauſe as a leaſe this cannot be good without writing, and as a compoſition or agreement it cannot be good, becauſe it is uncertain at the making of it. *Cro. Jac.* 137. *Cro. Eliz.* 188, 249. *Noy* 121. *Yelv.* 94. 2 *Leon.* 29. 3 *Leon.* 357. *Godb.* 333. *Palm.* 377. 2 *Brownl.* 171. 1 *Leo.* 24.

But yet ſome books hold ſuch parol agreement for the life or incumbency of the parſon to be good, and that if he demands tithes againſt it in the 2 *Rol. Abr.* 63. *Godb.* 333. *Palm.* 377.

the ſpiritual court, a prohibition ſhall be awarded to ſtay his ſuit.

Hetley 31, 107, 122. *Yelv.* 94. *Noy* 121. 3 *Leon.* 257. 2 *Brownl.* 11. 2 *Rol. Abr.* 63. *Godb.* 354. 374. *Cro. Jac.* 668.

It is held in ſeveral books, that though ſuch parol agreement with the pariſhioner for the life or incumbency of the parſon be not good, yet if it be for ſo many years certain, that this is good, tho' it be not by deed or writing; becauſe it is in nature of a compoſition or agreement with the pariſhioner himſelf, who ought to pay them; and that therefore if he ſues in the ſpiritual court for tithes, againſt ſuch agreement, that a prohibition ſhall be awarded to ſtay his proceedings.

Hetley 31. *Yelv.* 94.

So it is likewiſe held, in purſuance of that opinion, that if the pariſhioner, after ſuch agreement to retain the tithes for years, makes a leaſe of thoſe lands to another, that the leſſee alſo ſhall be diſcharged of the payment of tithes, becauſe the diſcharge runs along with the land; but others held the contrary; and that if the aſſignee be ſued in the ſpiritual court he ſhall have no prohibition, becauſe by ſuch parol contract no intereſt was transferred to the pariſhioner, but it was only a perſonal agreement between the parties themſelves, and cannot extend to ſtrangers.

2 *Rol. Abr.* 63. *Cro. Jac.* 668. *Godb.* 333. *Palm.* 377.

But all that hold ſuch parol agreement for years to be good, hold likewiſe, that if the agreement were with the pariſhioner, his executors and aſſigns, that there the executors or aſſigns of the pariſhioner, or even their leſſee at will, ſhall take advantage thereof; and if they are ſued in the ſpiritual court ſhall have a prohibition, and compel the parſon to take his remedy upon the contract; and that if the executors of the pariſhioner has made a leaſe over at will, they ſhall have their remedy over againſt the tenant at will, who came in under the benefit of ſuch a diſcharge, and therefore ought to be contributory to the charge of it, and that granting ſuch prohibition is a means to compel the parſon to ſeek his true remedy.

And

And yet we find ſome caſes, where ſuch agreement was by deed with the pariſhioner and his aſſigns, that the pariſhioner or aſſignee, being ſued in the ſpiritual court, would have no prohibition, becauſe, as they held, the covenant or agreement paſſed no intereſt in the tithes; and therefore for breach of ſuch covenant, the aſſignee had no remedy but by action of covenant on the deed. *Palm.* 36, 377. 2 *Leon.* 73.

Accordingly alſo ſeveral books held, that tho' ſuch parol agreement for life, or years, be not ſufficient foundation for granting a prohibition, yet ſuch ſuit in the ſpiritual court is a breach of the contract or agreement, for which the party may have remedy by action upon the caſe, upon the *aſſumpſit* he ſhould hold diſcharged. 2 *Leon.* 29. *Poph.* 144. *Godb.* 333. *Palm.* 397. 1 *Rol. Abr.* 48.

So likewiſe it is held in ſeveral books, that tho' ſuch parol agreement to retain for life, or years, be not good by way of paſſing an intereſt; yet if an action of debt be brought upon the ſtatute 2 *E.* 6. and the agreement be pleaded, and found for the defendant, that this ſhall be ſufficient to bar the plaintiff of the treble damages given by that ſtatute; ſo if *nihil debet* be pleaded, and ſuch agreement be given in evidence, it is ſufficient to excuſe the defendant from the penalty of treble damages. 1 *Lev.* 24. *Raym.* 14. 1 *Keb.* 5, 211. 2 *Keb.* 34. 3 *Keb.* 24.

But the beſt opinion ſeems to be, that ſuch parol agreement with the pariſhioner himſelf for more than one year is void; and even to make good this, it ought not to be entered into till after the corn ſown, becauſe when once the corn is ſown, then it is ſuppoſed to be in *eſſe*, and growing all that year; and then ſuch agreement is in the nature of a ſale of a thing or chattel actually in *eſſe*, which, like ſales of other goods and chattels, needs no writing; but if it be for more than one year, then it is in the nature of a leaſe or grant of the parſon's right or intereſt in the tithes, which before they are in *eſſe* conſiſts only in notion; and 2 *Brownl.* 17. *Cro. Jac.* 137. *Hob.* 176. *Cro. Eliz.* 188, 249. 2 *Leon.* 29. 3 *Leon.* 257. *Owen* 103. 1 *Lev.* 24. *Raym.* 14. 1 *Keb.* 5. *Godb.* 333, 354. *Latch* 176. *Noy* 89. *Comp. Incumb.* 338.

therefore to bind the parſon, there ought to be a deed or writing; and if there be not, he may ſue for them in the ſpiritual court, and ſhall not be tied up by a prohibition; and ſuch parol grant or agreement, for more years than one, is not only void for all the years after the firſt, but in the whole; for the contract being entire, muſt be void in all, and ſhall not be good and void by parcels.

Comp. Incumb. 338. *Latch.* 176. *Noy* 89. *Godb.* 374.

But a diverſity ſeems to be taken in ſome books between the parſon or vicar and the impropriator; the parſon or vicar, they ſay, may leaſe his tithes for one year without deed, but the impropriator cannot, but it will be abſolutely void; and it is ſaid to be ſo ruled in *Bennet* and *Snell*'s caſe; and in the caſe of *Bellamy* and *Balthorp*, it appearing that the leaſe for one year by the impropriator which was held void, being to a ſtranger, of the tithes of the whole pariſh, by the oppoſition that follows in ſaying otherwiſe it is, if it be a leaſe of the tithes for a year, by the parſon himſelf, it muſt alſo be meant of a leaſe to a ſtranger, and not to the pariſhioner himſelf, who ought to pay them, and then it follows, that a parſon or vicar may leaſe the tithes of their whole pariſh for one year to a ſtranger without deed, which, it ſeems, they may do notwithſtanding the books above-mentioned, as is proved by conſtant practice; for perhaps it would be difficult and troubleſome for the parſon himſelf to collect all the tithes *in ſpecie*, and it may be ſeveral of the pariſhioners will not take leaſes, or agree or compound for their own tithes; and therefore if the parſon can find one who will take all that trouble off his hands, and leave him more at liberty to attend his cure, it ſeems reaſonable he ſhould be at liberty to ſet his tithes (as they call it) to ſuch perſon for that year; and it would be too troubleſome and unreaſonable to expect, that upon every ſuch yearly ſetting of his tithes, he ſhould be

be forced to be at the expence of a new and formal leaſe in writing, eſpecially ſince ſuch ſetting or leaſing is generally made about *Eaſter*, when the corn is actually growing and in a good forwardneſs; and therefore ſuch ſetting or leaſing is rather a ſale of a chattel *in eſſe*, than a leaſing or making over of a thing only in potentiality or idea, and then ſuch ſale may be good without deed, as it would be of any other goods or chattels; and why the impropriator himſelf, in the like caſe, ſhould not have the ſame power, ſeems hard to be accounted for; though perhaps in the caſe where this difference is taken, the vendee or leſſee, ſtrictly ſpeaking, could not juſtify in Trover againſt the owner, as by virtue of the leaſe *qua* leaſe without deed: But *quære*, if he had pleaded it as a ſale for a valuable conſideration, if that would not have altered the caſe, and made good his juſtification in taking them after they were ſevered.

A parſon by parol leaſed his tithe hay to the vicar, and the vicar paid the rent for the firſt year, but finding that the rent was more than the tithe was worth, refuſed to hold the bargain any longer; and being ſued in the court of requeſts (which was a court of equity), and then not pleading there any notice of his refuſal, and ſentence and decree being given for the parſon, the vicar prayed a prohibition; and it was agreed by the court, that if the vicar had received the profits, he was ſuable in the court of requeſts for the rent, and that if he had given notice of the refuſal of the bargain, he had been diſcharged of the rent from the time of the notice given, becauſe he had no remedy for the tithes, for that it was a void contract in law; and by *Dodderidge* and *Jones* the caſe is the ſame, though he hath not given notice. *Latch* 115 *Palm.* 423 S. C.

By all the caſes before-mentioned, it appears how unſettled a point this is; and it is ſaid now to be the conſtant practice of the courts at *Weſtminſter* not to grant prohibitions upon the ſuggeſtions of *Comp. Incumb.* 339, 340.

ſuch

ſuch agreements, but to leave it to the ſpiritual court to determine; and if the party thinks himſelf there aggrieved, he may appeal; and this ſeems to hold ſtill, as to ſuch parol leaſes under the term of three years; for if they be above three years, then by the ſtatute of frauds and perjuries they are made to have the force only of leaſes at will; and if under three years, yet by that ſtatute there muſt be yearly reſerved two thirds at leaſt, of the full improved value of the thing demiſed. See ſtatute 5 *Geo.* 3. *c.* 17. in *page* 183.

CHAP. XI.

Of the manner of paying tithes, and the ſums payable by the reſpective pariſhes in London.

IN the ſeveral acts of the 27 *H.* 8. *c.* 20. 32 *H.* 8. *c.* 7. 2 & 3 *Ed.* 6. *c.* 13. and 7 & 8 *W.* *c.* 6. There is a proviſo that nothing therein ſhall extend to the city of *London* concerning any tithe, offering or other eccleſiaſtical duty grown and due to be paid within the ſaid city; becauſe there is another order made for the payment of tithes and other duties there; which order is as followeth: It appeareth by the records of the city of *London* that *Niger* biſhop of *London* in the 13 *Hen.* 3. made a conſtitution, in confirmation of an ancient cuſtom formerly uſed time out of mind, that proviſions ſhould be made for the miniſters of *London* in this manner, that is to ſay, that he who paid the rent of 20 *s.* for his houſe wherein he dwelt, ſhould offer every Sunday and every Apoſtle's day whereof the evening was faſted, one half-penny, and he that paid but 10 *s.* rent yearly, ſhould offer but one farthing; all which amounted to the proportion of 2 *s.* 6 *d.* in the pound, for there were 52 Sundays, and

Bo. Priv. Lond. 94, 95, 96.

and eight Apoſtle's days, the vigils of which were faſted. And if it chanced that one of the Apoſtle's days fell upon a Sunday, then there was but one half-penny or farthing paid; ſo that ſometimes it fell out to be ſomewhat leſs than 2 *s.* 6 *d.* in the pound. And it appears by the book caſes in the reign of *Edward* the *Third*, that the proviſion made for the miniſters of *London* was by offerings and obventions; albeit the particulars are not aſſigned there, but muſt be underſtood according to the former ordinance made by *Niger*: And the payment of 2 *s.* 6 *d.* in the pound continuing until the 13 *Ric.* 2. *Arundel*, archbiſhop of *Canterbury* made an explanation of *Niger*'s conſtitution, and thruſt upon the citizens of *London* two and twenty more Saint days than were intended by the conſtitution made by *Niger*; whereby the offerings now amounted to the ſum of 3 *s.* 5 *d.* in the pound. And there being ſome reluctation by the citizens of *London*, Pope *Innocent* in the 5 *H.* 4. granted his bull, whereby *Arundel's* explanation was confirmed; which confirmation (notwithſtanding the difference between the miniſters and citizens of *London*, about theſe two and twenty Saint days which were added to their number) Pope *Nicholas* alſo by his bull did confirm in the 31 *Hen.* 6. againſt which the citizens of *London* did contend with ſo high a hand, that they cauſed a record to be made, whereby it might appear in future ages, that the order of explanation made by the archbiſhop of *Canterbury* was done without calling the citizens of *London* unto it, or any conſent given by them. And it was branded by them as an order ſurreptitiouſly and abruptly obtained, and therefore more fit to have the name of a deſtructory than a declaratory order. But notwithſtanding this contention, the payment ſeemeth to have been moſt uſually made according to the rate of 3 *s.* 5 *d.* in the pound. For *Lyndwood*, who wrote in the time

time of *Hen.* 6. in his provincial conſtitutions debating the queſtion, whether the merchants and artificers of the city of *London* ought to pay any tithes, ſheweth, that the citizens of *London* by an ancient ordinance obſerved in the ſaid city, are bound every Lord's day and every principal feaſt day, either of the Apoſtles or others, whoſe vigils are faſted, to pay one farthing for every 10*s.* rent that they paid for their houſes wherein they dwelt. And in the 36 *Hen.* 6. there was a compoſition made between the citizens of *London*, and the miniſters, that a payment ſhould be made by the citizens according to the rate of 3*s.* 5*d.* in the pound; and if any houſe were kept in the proper hand of the owner or were demiſed without reſervation of any rent; then the churchwardens of the pariſh where the houſes were ſhould ſet down a rate of the houſes, and according to that rate payment ſhould be made. After which compoſition ſo made, there was an act of common council made in the 14 *Edw.* 4. in *London* for the confirmation of the bull granted by pope *Nicholas.* But the citizens of *London* finding, that by the Common laws of the realm, no bull of the pope, nor arbitrary compoſition, nor act of common council could bind them in ſuch things as concerned their inheritance; they ſtill wreſtled with the clergy, and would not condeſcend to the payment of the ſaid 11*d.* by the year, obtruded upon them by the addition of the two and twenty Saint days; whereupon there was a ſubmiſſion to the lord chancellor and divers others of the privy council in the time of king *Hen.* 8. and they made an order for the payment of tithes according to the rate of 2*s.* 9*d.* in the pound, which order was firſt promulgated by a proclamation made, and afterwards eſtabliſhed by an act of parliament made in the 27 *H.* 8. *c.* 21. intituled, "An act for the payment of tithes within the city and ſuburbs of *London* until another law and order ſhall be made and publiſhed for the ſame.

And

And ten years after this another law and order was made by the ſtatute of the 37 *H.* 8. *c.* 12. (intituled, An act for tithes in *London*) as followeth: Where of late time contention, ſtrife and variance hath ariſen and grown, within the city of *London* and the liberties of the ſame, between the parſons, vicars and curates of the ſaid city, and the citizens and inhabitants of the ſame, for and concerning the payment of tithes, oblations and other duties within the ſaid city and liberties; for appeaſing whereof, a certain order and decree was made thereof by the moſt reverend father in God, *Thomas* archbiſhop of *Canterbury*, *Thomas Audley*, knight, lord *Audley* of *Walden*, and then lord chancellor of *England*, now deceaſed, and other of the king's moſt honourable Privy council, and alſo the king's letters patents, and proclamation was made thereof, and directed to the ſaid citizens concerning the ſame; whereupon it was after enacted in the parliament holden at *Weſtminſter* by prorogation the fourth day of *February* in the twenty-ſeventh year of the king's moſt noble reign, that the citizens and inhabitants of the ſame city ſhould, at *Eaſter* then next following, pay unto the curates of the ſaid city and ſuburbs, all ſuch and like ſums of money for tithes, oblations and other duties, as the ſaid citizens and inhabitants, by the order of the ſaid late lord chancellor and other the king's moſt honourable council, and the king's ſaid proclamation, paid or ought to have paid, by force and virtue of the ſaid order at *Eaſter* in the year 1535; and the ſame payments ſo to continue from time to time, until ſuch time as any other order or law ſhould be made by the king, and the two and thirty perſons by the king to be named, as well for the full eſtabliſhment concerning the payment of all tithes, oblations and other duties of the inhabitants within the ſaid city, ſuburbs and liberties of the ſame, as for the making of other eccleſiaſti-

For appeaſing of contentions concerning tithes in the city of *London*, an order was made and obedience to it enjoined, according to the 27 *Hen.* 8. *c.* 21.

cal laws of this realm of *England*; and that every perſon denying to pay, as is aforeſaid, ſhould, by the commandment of the mayor of *London* for the time being, be committed to priſon, there to remain until ſuch time as he ſhould have agreed with the curate for his ſaid tithes, oblations and other duties as is aforeſaid, as in the ſaid act more plainly appeareth; ſince which act divers variances, contentions and ſtrifes are newly riſen and grown between the ſaid parſons, vicars and curates, and the ſaid citizens and inhabitants touching the payment of the tithes, oblations and other duties, by reaſon of certain words and terms ſpecified in the ſaid order, which are not ſo plainly and fully ſet forth as is thought convenient and meet to be; for appeaſing whereof, as well the ſaid parſons, vicars and curates, as the ſaid citizens and inhabitants have compromitted, and put themſelves to ſtand to ſuch order and decree touching the premiſſes as ſhall be made by the ſaid right reverend father in God, and the ſeveral other perſons here under-mentioned, for a final end and concluſion to be had and made touching the premiſſes for ever; and to the intent to have a full peace and perfect end between the ſaid parties, their heirs and ſucceſſors, touching the ſaid tithes, oblations and other duties for ever, it is enacted, That ſuch end, order and direction as ſhall be made by the fore-named archbiſhop and the ſeveral other perſons as aforeſaid, or any ſix of them, before the firſt day of *March* next enſuing, concerning the payment of tithes, oblations and other duties within the ſaid city and the liberties thereof, and inrolled of record in the high court of Chancery, ſhall ſtand, remain, and be as an act of parliament, and ſhall bind as well all citizens and inhabitants of the ſaid city and liberties, for the time being, as the ſaid parſons, vicars, curates and their ſucceſſors for ever, according to the effect, purport and intent of the ſaid order and decree ſo

Since which, new contentions have ariſen; and a reference having been made for appeaſing thereof to divers honourable perſons;

Enacted, that the decree to be made by the ſaid perſons, and enrolled in Chancery, ſhall be as an act of Parliament, and ſhall be obeyed upon pain of impriſonment by the lord mayor or lord chancellor.

to

to be made and inrolled; and that every perſon denying to pay any of his tithes, oblations, or other duties contrary to the ſaid decree ſo to be made, ſhall by the commandment of the mayor of *London* for the time being, and in his default or negligence, by the lord chancellor of *England* for the time being, be committed to priſon, there to remain till ſuch time as he hath agreed with the curate for the ſame.

Which decree made in purſuance hereof, is as followeth, *viz.* 2. As touching the payment of tithes in the city of *London*, and the liberties of the ſame, It is fully ordered and decreed by the moſt reverend father in god, *Thomas* archbiſhop of *Canterbury*, primate and metropolitan of *England*, *Thomas* lord *Wryotheſly*, lord chancellor of *England*, *William* lord *St. John*, preſident of his majeſty's council, and lord great maſter of his ma- majeſty's houſhold, *John* lord *Ruſſel* lord privy ſeal, *Edward* earl of *Hertford*, lord great chamberlain of *England*, *John* viſcount *Liſle*, high admiral of *England*, *Richard Liſter*, knight, chief juſtice of *England*, and *Roger Cholmely*, knight, chief baron of his majeſty's Exchequer, this twenty-fourth day of *February* in the year of our Lord 1545. according to the ſtatute in ſuch caſe lately provided, that the citizens and inhabitants of the ſaid city and liberties thereof for the time being, ſhall yearly without fraud or covin for ever pay their tithes to the parſons, vicars and curates of the ſaid city, and their ſucceſſors for the time being, after the rate hereafter following; that is to wit, Of every 10*s.* rent by the year, of all houſes, ſhops, ware-houſes, cellars, ſtables, and every of them, within the ſaid city and liberty thereof, 16*d.* ½ and of every 20*s.* rent by the year 2*s.* 9*d.* and ſo above the rent of 20*s.* by the year, as ending from 10*s.* to 10*s.* according to the rate aforeſaid.

Decree by the ſaid perſons.

That every houſe, &c. of 10*s.* rent ſhall pay 16*d.* halfpenny; and of 20*s.* rent 2*s.* 9*d.* and ſo above in proportion.

Houſes, &c. leaſed without rent by reaſon of fines, ſhall pay tithe according to the *laſt* rent.

(3.) *Item*, That where any leaſe is or ſhall be made of any dwelling-houſe or houſes, ſhops, warehouſes, cellars or ſtables, or any of them, by fraud or covin, reſerving leſs rent than hath been accuſtomed, or is, or where any ſuch leaſe ſhall be made without any rent reſerved upon the ſame by reaſon of any fine or income paid before hand, or by any other fraud or covin; in every ſuch caſe the tenant or farmer ſhall pay for his tithes of the ſame after the rate aforeſaid, according to the quality of ſuch rents as the ſame were laſt letten for, without fraud or covin, before the making of ſuch leaſe.

(4.) *Item*, That every owner or inheritor of any dwelling-houſe or houſes, ſhops, warehouſes, cellars, or ſtables, inhabiting or occupying the ſame himſelf, ſhall pay after ſuch rate, according to the quantity of ſuch yearly rent as the ſame was laſt letten for, without fraud or covin.

Where more perſons dwell in the ſame houſe, the firſt taker ſhall pay the tithe.

(5.) *Item*, If any perſon hath taken, or hereafter ſhall take any meaſe or manſion-place by leaſe, and the taker thereof, his executor or aſſigns, doth or ſhall inhabit in any part thereof, and hath within eight years laſt paſt before this order, or hereafter ſhall let out the reſidue of the ſame; in ſuch caſe the principal farmer or farmers, or firſt taker or takers thereof, their executors or aſſigns ſhall pay their tithes after the rate aforeſaid, according to the quantity of their rent by the year.

But one perſon taking divers houſes, &c. ſhall pay for what he retains, and his aſſignees for the reſt.

(6.) And if any perſon ſhall take divers manſion-houſes, ſhops, warehouſes, cellars or ſtables in one leaſe, and ſhall let out one or more of them, and ſhall keep one or more in his own hands, and inhabit in the ſame, the ſaid taker and his executors or aſſigns ſhall pay their tithes after the rate aboveſaid, according to the quantity of the yearly rent of ſuch manſion-houſe or houſes retained in his own hands; and his aſſignees of the reſidue of the ſaid manſion-houſe or houſes ſhall pay their

their tithes after the rate aboveſaid according to the quantity of their yearly rents.

(7.) *Item*, If ſuch farmer or farmers, or his or their aſſigns of any manſion-houſe or houſes, warehouſes, ſhops, cellars or ſtables, hath at any time within eight years laſt paſt, or ſhall hereafter let over all the ſaid manſion-houſe or houſes contained in his or their leaſe to one or more perſons, the inhabitants, leſſees or occupiers thereof, ſhall pay their tithes after the rate of ſuch rents as the inhabitants, leſſees or occupiers, and their aſſigns have been or ſhall be charged withal, without fraud or covin.

Houſes, &c. being united or divided, ſhall pay according to the accuſtomed proportion.

(8.) *Item*, If any dwelling-houſe within eight years laſt paſt, was or hereafter ſhall be converted into a warehouſe, ſtorehouſe, or ſuch like, or if a warehouſe, ſtorehouſe, or ſuch like, within the ſaid eight years, was or hereafter ſhall be converted into a dwelling-houſe, the occupier thereof ſhall pay tithes for the ſame after the rate above declared of manſion-houſe rents.

And ſo alſo if converted to other uſes.

(9.) *Item*, That where any perſon ſhall demiſe any dyehouſe or brewhouſe, with implements convenient and neceſſary for dying or brewing, reſerving a rent upon the ſame, as well in reſpect of ſuch implements as in reſpect of ſuch dye-houſe or brewhouſe, the tenant ſhall pay his tithes after ſuch rate as is aboveſaid, the third penny abated; and every principal houſe or houſes, with key or wharf having any crane or gibbet belonging to the ſame, ſhall pay after the like rate of their rents as is aforeſaid, the third penny abated, and other wharfs belonging to houſes having no crane or gibbet, ſhall pay for tithes as ſhall be paid for manſion-houſes in form aforeſaid.

Where implements, cranes, &c. are let with work-houſes of any kind, the third penny ſhall be abated.

(10.) *Item*, That where any manſion-houſe, with a ſhop, ſtable, warehouſe, wharf with crane, timber-yard, teinter-yard, or garden belonging to the ſame, or

But ſhops, yards, &c. being united to a houſe, ſhall pay the full rent, if ſevered from it.

as parcel of the ſame, is or ſhall be occupied together, if the ſame be hereafter ſevered or divided, or at any time within eight years laſt paſt were ſevered or divided; then the farmers or occupiers thereof ſhall pay ſuch tithes as is aboveſaid, for ſuch ſhops, ſtables, warehouſes, wharf with crane, timber-yard, teinter-yard, or garden aforeſaid, ſo ſevered or divided, after the rate of their ſeveral rents thereupon reſerved.

Tithes ſhall be paid quarterly.

(11.) *Item*, That the ſaid citizens and inhabitants ſhall pay their tithes quarterly; that is to ſay, at the Feaſt of *Eaſter*, the Nativity of *St. John Baptiſt*, the Feaſt of *St. Michael the Archangel*, and the Nativity of our Lord, by even portions.

(12.) *Item*, That every houſeholder paying 10*s.* rent, or above, ſhall for him or herſelf be diſcharged of their four offering days; but his wife, children, ſervants, or others of their family taking their rights of the church at *Eaſter*, ſhall pay 2*s.* for their four offering days yearly.

Any houſe of 10*s.* or above, being let into ſmall parcels, tithe ſhall be paid, according to that rate, by the owner, or principal leſſee.

(13.) Provided always, and it is decreed, that if any houſe, which hath been or hereafter ſhall be letten for 10*s.* rent by the year, or more, be or hath been at any time within eight years laſt paſt, or hereafter ſhall be divided and leaſed into ſmall parcels or members, yielding leſs yearly rent than 10*s.* by the year; the owner, if he ſhall dwell in any part of ſuch houſe, or elſe the principal leſſee (if the owner do not dwell in ſome part of the ſame) ſhall pay for the tithes after ſuch rate of rent as the ſame houſe was accuſtomed to be letten for before ſuch diviſion or dividing into parts or members; and the under farmers and leſſees to be diſcharged of all tithes for ſuch ſmall parcels, parts, or members, rented at leſs yearly rent than 10*s.* by the year, without fraud or covin, paying 2*d.* a-piece yearly for four offering days.

(14.) Provided

(14.) Provided alway, and it is decreed, that for ſuch gardens as appertain not to any manſion-houſe, and which any perſon holdeth in his hands for pleaſure, or to his own uſe; the perſon holding the ſame ſhall pay no tithes for the ſame; but if any perſon which ſhall hold any ſuch garden, containing half an acre or more, ſhall make any yearly profit thereof by way of ſale, he ſhall pay tithes for the ſame after ſuch rate of his rent as is herein firſt above ſpecified. Gardens, for pleaſure, ſhall pay no tithe; but otherwiſe, if for profit.

(15.) Provided alſo, that if any ſuch gardens now being of the quantity of half an acre, or more, be hereafter by fraud or covin divided into leſs quantities, then to pay according to the rate aboveſaid. And ſo if divided into leſs quantities:

(16.) Provided always, That this decree ſhall not extend to the houſes of great men or noblemen or noblewomen, kept in their own hands, and not letten for any rent, which in times paſt have paid no tithes, ſo long as they ſhall ſo continue unletten; nor to any halls of crafts or companies, ſo long as they be kept unletten, ſo that the ſame halls in time paſt have not uſed to pay any tithes. This decree ſhall not extend to houſes of noblemen, nor publick halls:

(17.) Provided always, and it is decreed, That this preſent order and decree ſhall not in any wiſe extend to bind or charge any ſheds, ſtables, cellars, timberyards, nor teinter-yards, which were never parcel of any dwelling-houſe, nor belonging to any dwelling-houſe, nor have been accuſtomed to pay any tithes; but that the ſaid citizens and inhabitants ſhall thereof be quit of payment of any tithes, as it hath been uſed and accuſtomed. Nor to ſheds, ſtables, &c. diſtinct, and which have not paid tithes.

(18.) Provided alſo, and it is decreed, That where leſs ſum than after ſixteen pence half-penny in the ten ſhill. rent, or leſs ſum than 2s. 9d. in the 20s. rent, hath been accuſtomed to be paid for tithes; in ſuch places the ſaid citizens and inhabitants ſhall pay but only after ſuch rate as hath been accuſtomed. Where leſs than the aforeſaid rates hath been cuſtomably paid leſs ſhall continue to be paid.

All controverſies ſhall be determined by the lord mayor;

(19.) *Item*, It is alſo decreed, That if any variance, controverſy or ſtrife ſhall ariſe in the ſaid city for non-payment of any tithes; or if any variance or doubt ſhall ariſe upon the true knowledge or diviſion of any rent or tithes within the liberties of the ſaid city, or of any extent or aſſeſſment thereof; or if any doubt ariſe upon any other thing contained within this decree; then upon complaint made by the party grieved to the mayor of the city of *London* for the time being, the ſaid mayor by the advice of council ſhall call the parties before him, and make a final end in the ſame with coſts to be awarded by the diſcretion of the ſaid mayor and his aſſiſtants, according to the intent and purport of this preſent decree.

Or (if the ſaid mayor do it not in two months) by the lord chancellor.

(20.) And if the mayor ſhall not make an end thereof within two months after complaint to him made; or if any of the ſaid parties find themſelves aggrieved, the lord chancellor of *England* for the time being, upon complaint to him made, within three months then next following, ſhall make an end in the ſame with ſuch coſts to be awarded as ſhall be thought convenient, according to the intent and purport of the ſaid decree.

Leaſe being taken at a lower rent than uſual, by reaſon of ruins, *&c.* payment ſhall be made only according to ſuch rent.

(21.) Provided always, That if any perſon take any tenement for a leſs rent than it was accuſtomed to be letten for, by reaſon of great ruin or decay, burning or ſuch like occaſions or misfortunes; ſuch perſon, his executors or aſſigns ſhall pay tithes only after the rate of the rent reſerved in his leaſe and none otherwiſe, as long as the ſame leaſe ſhall endure.

Of every 10*s. rent by the year*] See *ſect.* 2. of the foregoing decree. It was reſolved in the caſe of Dr. *Meadhouſe* againſt Dr. *Taylor*, that a rent for half a year, and afterwards for another half year, is a yearly rent, or a rent by the year within the meaning of this decree. *Noy* 130. *Gibſ. Cod.* 1221.

Of

Of all houſes] In the caſe of *Green* and *Piper*, *E.* 34 *Eliz.* it was ſuggeſted, in order to hinder the granting of a conſultation, that the houſe belonged to a priory which was diſcharged of tithes by bull. But the court replied, that by the Common law houſes paid no tithes; and the right in the preſent caſe ſubſiſting immediately upon this ſtatute, which lays them upon every houſe, no exemption ſhall be allowed but to ſuch houſes as are ſpecially exempted by the ſtatute itſelf. *Cro. Eliz.* 276. *Mo.* 912. *Gibſ. Cod.* 1221.

By reaſon of any fine or income paid beforehand, or by any other fraud or covin] See *ſect.* 3. of the ſaid decree. *M.* 5 *Ja.* between *Skidmore* and *Eire* plaintiffs in a prohibition againſt *Bell* parſon of St. *Michael Queenhithe* in *London*; the caſe was this: The ſaid parſon libelled before the chancellor of *London* for the tithes of an houſe called the *Boar's head* in *Bread-ſtreet* in the ſaid pariſh, the ancient farm rent whereof was 5 *l.* at the time of the ſaid decree and after; and that of late a new leaſe was made of the ſaid houſe, rendering the rent of 5 *l.* a year, and over that a great income or fine which was covenanted and agreed to be paid yearly at the ſame day; that the rent was paid as a ſum in groſs, and that ſo much rent might have been reſerved for the ſaid houſe, as the rent reſerved and the ſum in groſs amounted unto; which reſervation and covenant were made to defraud the ſaid parſon of the tithes of the true rent of the ſaid houſe, which to him did appertain by the purport and true intention of the ſaid decree; and in this caſe four points were reſolved by the court. 1. If ſo much rent be reſerved, as was accuſtomed to be paid at the making of the ſaid decree (whatſoever fine or income be paid), that the parſon can aver no covin; for the words of the decree be, "Where any leaſe is or ſhall be made of any dwelling-houſe by fraud or covin in reſerving leſs rent than hath been

been accuſtomed:" So as if the accuſtomed rent be reſerved, no fraud can be alledged; for the fraud by the decree is, when leſſer rent than was then accuſtomed to be paid is reſerved, or if no rent at all be reſerved, for then tithe ſhall be paid according to the rent that then was laſt before reſerved to be paid, ſo as the decree conſiſteth upon four points; firſt, where the accuſtomed rent was reſerved; ſecondly, Where the rent was increaſed, then the tithes ſhould be paid according to the whole rent; thirdly, Where leſſer rent was reſerved; and fourthly, Where no rent was reſerved, but had been formerly reſerved. And this act and decree were very beneficial for the clergy of *London*, in reſpect of that which they had before. And the defendant in his libel confeſſeth, that the accuſtomed rent was reſerved; and therefore no cauſe of ſuit. 2. It was reſolved, That as to ſuch houſes as were never letten to farm, but inhabited by the owner, this is *caſus omiſſus*, and ſhall pay no tithes by force of the decree. 3. It was reſolved, That where the decree ſaith, "Where no rent is reſerved by reaſon of any fine or income paid beforehand;" albeit no fine or income be paid in that caſe, yet if no rent be reſerved, the parſon ſhall have his tithes according to the decree; for that is put but for an example or cauſe, why no rent is reſerved; and whether any fine or income were paid or no, is not material as to the parſon. 4. It was reſolved, That the parſon could not ſue for the ſaid tithes in the eccleſiaſtical court; for that the act and decree that raiſed and gave theſe kind of tithes, did limit and appoint how and before whom the ſame ſhould be ſued for, and did appoint new and ſpecial judges to hear and determine the ſame; and in the end it was awarded that the prohibition ſhould ſtand. 2 *Inſt.* 660.

Upon

Upon complaint made] See *ſect.* 19. of the foregoing decree. In the aforeſaid caſe of Dr. *Meadhouſe* and Dr. *Taylor*, it was held by the court, that the complaint ought to be in writing (and not by word of mouth only), in nature of a *monſtrans de droit*, declaring all the title. *Noy* 130. *Gibſ. Cod.* 1223.

To the mayor] Purſuant to the aforeſaid caſe of *Skidmore* and *Eire*, diverſe prohibitions have been granted (when tithes were ſued for upon this ſtatute) to the eccleſiaſtical court. But when it was pleaded in the year 1658, that the right of tithes, upon the foundation of this act, could not be cognizable in the Exchequer, by reaſon of the proviſion therein made for determining of all controverſies before the lord mayor or lord chancellor; it was held clearly by the barons, that the court of Exchequer had juriſdiction in the cauſe, becauſe the act had no negative words in it. Upon which I ſhall only obſerve, ſays Dr. *Gibſon*, that if affirmative words will not exclude the temporal court, it may be hard to find a good reaſon, why, according to the foregoing judgments, they ſhould exclude the ſpiritual court. *Gibſ.* 1223.

Tithe of houſes in *Southwark.*

Bill for tithe of houſes not within the city of *London*, and ſo not within the ſtatute 37 *Hen.* 8. It was admitted by the plaintiff, that this demand was againſt common right, and he did not alledge this payment to be either by cuſtom or preſcription, but that this was the only proviſion for St. *Saviour's Southwark*, in right of which church the plaintiff claimed: It was proved that the houſes in the pariſh had, ſince the year 1653, generally paid twelve ſhillings *per annum*; but no proof that the defendant's houſe had paid for twenty-five years, but by one ſingle witneſs; yet the court decreed an account without directing an iſſue. *Bunb. Rep.* 102. *Hil.* 1721. *Pocock* v. *Titmarſh.*

Bill

Tithe of houſes in *London*. Cuſtomary payments, ſet up againſt it.

Bill by the vicar of *Cripplegate* for two ſhillings and nine-pence *per pound*, according to the rent of the houſes, purſuant to the decree and ſtatute 27 *Hen.* 8. and to ſupport the juriſdiction of this court (the ſtatute giving power to the lord mayor of *London* to determine, *&c.*) The following caſes were cited, *Hard.* 116. 2 *Inſt.* 660. *Lit. Rep.* 102, 141. *Degge* 351. *Watſon* 387. *Cro. Car.* 596. *Hob.* 11. Several inſtances were given, where the two ſhillings and nine-pence *per pound* had been decreed, as the caſe of St. *Bride's*, *Townley* v. *Wilſon*, *Mich.* 1705; *Sawyer* v. *Montford*, 1694; *Grant* v. *Cannon*, *Mich.* 5 *W. & M. Sheffield* v. *Serjeant*, 1658; St. *Swithin's*, *Humfreville* v. *Plumſted*; *Aldgate* pariſh, 21 *Car.* 2. But the difficulty in this caſe was, that here appeared to have been paid from time to time ſeveral payments, as ten ſhillings for *T.*'s houſe, ſix ſhillings for *Borkett's*, and four ſhillings for *Whitett's*, and the charges in the vicar's books appeared to be the ſame, though in ſome of them the payments ſometimes varied, and the right of the vicar cannot be deſtroyed, but by an uniform, conſtant payment. (See the ſtatute.) This being a thing of great conſequence, the court took time to conſider of this decree.

In *Michaelmas* term, *Octob.* 26, 1722. the court gave judgment: Baron *Price*; That there ought to be a general decree for the plaintiff; *Mountague*, *Page* and *Gilbert* directed an iſſue to try whether there had been ſuch cuſtomary payments, as was ſet up by defendants; and a verdict was for the defendants. From this decree Doctor *Bennet* appealed, and the decree was confirmed. *Bunb.* 106, 107. *Paſch.* 1722. Doctor *Bennett* v. *Treppas & al'*.

An iſſue

An iſſue was directed in this cauſe, to try whether there had been any variation in the payment of tithes, or ſums of money in lieu of them, for houſes in *London*, according to the ſtatute 37 *Hen.* 8. It was now moved, that the plaintiff ſhould produce at the trial the books of the former rectors; and although it was objected, that theſe were properly private books, and the plaintiff's own evidence, yet as they had before been produced at the hearing of the cauſe, and as the iſſue to be tried is to inform the conſcience of the court, the jury ought to have all the light the court can give them: ſo *per curiam*, the plaintiff was ordered to produce theſe books at the trial. *Bunb.* 143. *Hil.* 1723. *Dr. Bennet* v. *Treppas & al.*

Books of former rectors produced upon trial of an iſſue, whether any variation had been, as to ſums paid for tithes of houſes in *London*.

After all, notwithſtanding the ſettlement by the aforeſaid decree, divers preſcriptions for the payment of leſſer rates than the parſons might require by the ſaid ſettlement, (as to pay 10*s.* for the tithe of an houſe, although the rent thereof was 40*l.* a-year or more,) have been gained and allowed. But upon the occaſion of the Fire of *London* in the year, 1666, as to the churches and houſes thereby conſumed, another ſtatute was made, namely the 22 & 23 *C.* 2. *c.* 15. (intitled, An act for the better ſettlement of the maintenance of the parſons, vicars, and curates, in the pariſhes of the city of *London*,) which is as follows: "Whereas the tithes "in the city of *London*, were levied and paid with "great inequality, and are, ſince the late dreadful "Fire there, in the rebuilding of the ſame, by ta"king away ſome houſes, altering the foundation "of many, and the new erecting of others, ſo diſ"ordered, that in caſe they ſhould not for the "time to come be reduced to a certainty, many "controverſies and ſuits of law might thence a"riſe; it is therefore enacted, that the annual cer"tain tithes of the pariſhes within the ſaid city "and liberties thereof, whoſe churches have been demoliſhed,

" demoliſhed, or in part conſumed by the late fire, " and which ſaid pariſhes, by virtue of an act of " this preſent parliament, remain and continue " ſingle, as heretofore they were, or are by the " ſaid act annexed or united into one pariſh reſ- " pectively, ſhall be as followeth: that is to ſay, " the annual certain tithes, or ſum of money in " lieu of tithes; " of

	£.	s.
The pariſh of Alhallows, Lombard-ſtreet	110	0
St. Bartholomew, Exchange	100	0
St. Bridget, *alias* Brides	120	0
St. Bennet Finck	100	0
St. Michael, Crooked-lane	100	0
St. Chriſtopher	120	0
St. Dionis Backchurch	120	0
St. Dunſtan in the Eaſt	200	0
St. James, Garlick-hythe	100	0
St. Michael, Cornhill	140	0
St. Michael, Baſſiſhaw	132	11
St. Margaret, Lothbury	100	0
St. Mary, Aldermanbury	150	0
St. Martin, Ludgate	160	0
St. Peter, Cornhill	110	0
St. Stephen, Coleman-ſtreet	110	0
St. Sepulchre	200	0
St. Alhallows, Breadſtreet, and St. John Evangeliſt	140	0
Alhallows the Great and Alhallows the Leſs	200	0
St. Alban, Wood-ſtreet, and St. Olaves, Silver-ſtreet	170	0
St. Anne and Agnes, and St. John Zachary	140	0
St. Auguſtine, and St. Faith	172	0
St. Andrew Wardrobe, and St. Anne, Black-friars	140	0
St. Antholin, and St. John Baptiſt	120	0
St. Bennet, Grace-church, and St. Leonard, Eaſt-cheap	140	0

St.

	£.	s.
St. Bennet, Paul's-wharf, and St. Peter's, Paul's-wharf	100	0
Chriſt-church, and St. Leonard, Foſter-lane	200	0
St. Edmond the King, and St. Nicholas Acons	180	0
St. George, Botolph-lane, and St. Botolph, Billingſgate	180	0
Lawrence Jury, and St. Magdalen, Milk-ſtreet	120	0
St. Magnus, and St. Margaret, New Fiſh-ſtreet	170	0
St. Michael Royal, and St. Martin Vintry	140	0
St. Matthew, Friday-ſtreet, and St. Peter Cheap	150	0
St. Margaret Pattons, and St. Gabriel Fenchurch	120	0
St. Mary at Hill, and St. Andrew Hubbard	200	0
St Mary Woolnoth, and St. Mary Woolchurch	160	0
St. Clement Eaſtcheap, and St. Martin Orgars	140	0
St. Mary Ab-church, and St. Lawrence Pountney	120	0
St. Mary Aldermary, and St. Thomas Apoſtle	150	0
St. Mary le Bow, St. Pancras, Soper-lane, and Alhallows, Honey-lane	200	0
St. Mildred Poultrey, and St. Mary Colechurch	170	0
St. Michael, Wood-ſtreet, and St. Mary Staining	100	0
St. Mildred, Bread-ſtreet, and St. Margaret Moſes	130	0
St. Michael, Queenhithe, and Trinity	160	0
St. Magdalen, Old Fiſh-ſtreet, and St. Gregory	120	0
St. Mary Somerſet, and St. Mary Mounthaw	110	0

St.

	£.	s.
St. Nicholas, Cole-abbey, and St. Nicholas, Olaves	130	0
St. Olave, Jewry, and St. Martin, Ironmonger-lane	120	0
St. Stephen, Walbrook, and St. Bennet, Sheerhogg	100	0
St. Swythin, and St. Mary Bothaw	140	0
St. Vedast *alias* Foster's, and St. Michael Quern	160	0

Sect. 3. Which reſpective ſums of money to be paid in lieu of tithes within the ſaid reſpective pariſhes, and aſſeſſed as hereinafter is directed, ſhall be the reſpective certain annual maintenance (over and above glebes and perquiſites, gifts and bequeſts, to the reſpective parſon, vicar, and curate of any pariſh for the time being, or to their ſucceſſors reſpectively, or to others for their uſe) of the ſaid reſpective parſons, vicars, and curates, who ſhall be legally inſtituted, inducted, and admitted into the reſpective pariſhes aforeſaid.

Sect. 4, 5, 6, 7. And for the more equal levying of the ſame upon the ſeveral houſes, buildings, and other hereditaments within the reſpective pariſhes, aſſeſſments were ordered to be made before *July* 24, 1671, upon all houſes, ſhops, warehouſes, and cellars, wharfs, keys, cranes, water-houſes, tofts of ground (remaining unbuilt) and all other hereditaments whatſoever (except parſonage and vicarage houſes,) the whole reſpective ſum by this act appointed, or ſo much of it as is more than what each impropriator is by this act injoined to allow.

Sect. 8. And three tranſcripts of the aſſeſſments were to be made; one to be depoſited amongſt the records of the city, another in the regiſtry of the biſhop of *London*, and another in the pariſh veſtry reſpectively, for a perpetual memorial thereof.

Sect. 9. The ſums aſſeſſed to be paid to the reſpective parſons, vicars, and curates, at the four moſt uſual feaſts, to wit, at the annunciation of the bleſſed virgin, the nativity of St. *John* Baptiſt, the feaſt of St. *Michael* the Archangel, and the nativity of our Bleſſed Saviour, or within fourteen days after each of the feaſts aforeſaid, by equal payments; the reſpective payments thereof to begin and commence only from ſuch time as the incumbent ſhall begin to officiate or preach as incumbent.

Sect. 10. Impropriators ſhall pay what *bona fide* they have uſed and ought to pay to the reſpective incumbents at any time before the ſaid late fire; the ſame to be computed as part of the maintenance of ſuch incumbent.

Sect. 11. And if any inhabitant ſhall refuſe or neglect to pay to the incumbent the ſum appointed by him to be paid, (the ſame being lawfully demanded upon the premiſſes;) it ſhall be lawful for the lord mayor, upon oath to be made before him of ſuch refuſal or neglect, to grant out warrants for the officer or perſon appointed to collect the ſame, with the aſſiſtance of a conſtable, in the day time, to levy the ſame by diſtreſs and ſale of the goods of the party ſo refuſing or neglecting; reſtoring to the owner the overplus over and above the ſaid arrears, and the reaſonable charges of making ſuch diſtreſs.

Sect. 12. And if the lord mayor ſhall refuſe or neglect to execute any of the powers to him given by this act; it ſhall be lawful for the lord chancellor or lord keeper, or two or more of the barons of the Exchequer, by warrant under their hands and ſeals reſpectively, to do and perform what the ſaid lord mayor might or ought to have done in the premiſſes.

Sect. 14. Provided, that no court or judge, eccleſiaſtical or temporal, ſhall hold plea of or for

any the ſum or ſums of money due and owing, or to be paid by virtue of this act; other than the perſons hereby authorized to have cognizance thereof: nor ſhall it be lawful to or for any parſon, vicar, curate, or incumbent, to convene or ſue any perſon aſſeſſed as aforeſaid, and refuſing or neglecting to pay the ſame, in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act for the hearing and determining of the ſame, in manner aforeſaid.

Sect. 15. Provided alſo, that it ſhall be lawful for the wardens and minors, canons of *St. Paul's*, parſon and proprietors of the rectory of the pariſh of *St. Gregory* aforeſaid, to receive and enjoy all tithes, oblations, and duties, ariſing or growing due within the ſaid pariſh, in as large and beneficial manner as formerly they have or lawfully might have done.

And for the better recovering the ſums of money which ſhall be due according to the directions of this act, and for the levying of arrears where the occupier removes from the premiſſes, or the houſes have ſtood empty, a decree was made in the year 1713, by *Harcourt* lord chancellor, aſſiſted by the barons *Bury* and *Price*, in the caſe of *Savage* and *Wood*, clerks, againſt *Harding and others*. Shaw's Par. L. 45.

The ſtatutes concerning building fifty new churches in or near *London* and *Weſtminſter*, and providing for the miniſters thereof, are as follow:

Stat. 9 *Ann. cap.* 22. *ſect.* 2. The money ariſing by the duty on coals imported into the *Thames*, of 2 *s. per* chalder from 14th *May* 1716, and 3 *s.* till 28th *September* 1724, is to be paid into the Exchequer, and appropriated for building fifty new churches, of ſtone and other materials, with towers or ſteeples to each, and for purchaſing ſites of churches and church-yards, and burying places, in

or

or near *London* and *Weſtminſter*, and for making ſuch chapels, as are capable thereof, pariſh churches; and for purchaſing houſes for miniſters, and for applying 4000 *l. per ann.* out of the ſaid duties, towards the repairing the collegiate church of *St. Peter Weſtminſter*, and 6000 *l. per ann.* towards the finiſhing *Greenwich* hoſpital.

Sect. 3. There ſhall be fifty churches built, whereof one ſhall be in the pariſh of *Greenwich*.

Sect. 4. Chapels already built, if fit, may be converted into pariſh churches.

Sect. 5. The queen, by letters patent, may nominate commiſſioners, who ſhall inform themſelves in what pariſhes the new churches are moſt neceſſary to be built, and of proper places to build them, and of church-yards and burying places to be bought; and ſhall limit the diſtinct pariſhes, *&c.*

Stat. 10 *Ann. c.* 11. *ſect.* 1. The commiſſioners for fifty new churches, or any five of them, are required to meet as often as they ſhall have occaſion, for building fifty new churches.

Sect. 2. The commiſſioners may purchaſe lands, *&c.* as they ſhall think proper for the ſaid new churches, and for church-yards, and for miniſters houſes.

Sect. 3. The lands ſo purchaſed ſhall be conveyed to five or more of the commiſſioners and their heirs, and they are to cauſe the churches to be built, and chapels already built to be made pariſh churches, and to provide houſes for miniſters, and church-yards to be made and incloſed.

Sect. 4. They may provide more than one cemetery for any new pariſh church, and without the bounds of the pariſh; and the ground purchaſed for that purpoſe ſhall be taken as part of the pariſh, after the purchaſe and conſecration thereof, and ſhall be diſcharged from any rates to the other pariſh out of which it was taken.

Sect. 7. The treaſury may iſſue out of the money ariſing by virtue of this or the former act 9 *Ann. c.* 22. ſuch ſums as five of the commiſſioners ſhall think neceſſary for purchaſing lands, *&c.* which money ſhall be paid to ſuch perſon as the crown ſhall appoint treaſurer thereof, not being a commiſſioner; and ſhall be accounted for by ſuch treaſurer, and diſburſed according to ſuch orders as he ſhall receive from the commiſſioners for the ſaid uſes; ſuch treaſurer to be accountable to the exchequer, and to give ſecurity approved of by the treaſury.

Sect. 8. The commiſſioners may, by a parchment writing inrolled in chancery, aſcertain the bounds of the ſite of each new church, and miniſter's houſe and church-yard, and alſo the diſtrict of each pariſh for every new church; and after the inrolment of ſuch writing and conſecration of the church, ſuch diſtrict ſhall be a diſtinct pariſh, except touching rates, relief for the poor, and rates for the highways.

Sect. 9. The commiſſioners may, by writing inrolled in chancery, take a part of any of the large pariſhes in and about *London* and *Weſtminſter*, where any new church ſhall be made, and unite the ſame to any other leſſer pariſh next adjoining, wherein a church is already built.

Sect. 10. There ſhall be a rector in every new church, and where there is a morning preacher in any chapel which ſhall be converted into a pariſh church, ſuch preacher ſhall, after the conſecration, be the firſt rector, without any admiſſion, inſtitution, or induction; and in every other new church, the firſt rector ſhall be appointed by the queen; and he and his ſucceſſors are incorporated, and ſhall be called the rector of ſuch new church, by the name that ſhall be given to it in the act of conſecration; and the freehold of the new church, *&c.* ſhall be in him and his ſucceſſors; and he and they may

may purchaſe lands, not exceeding the yearly value of 200 *l.* for each church.

Sect. 11. The commiſſioners may enquire of the right of patronage, *&c.* of any church from which any part ſhall be taken as aforeſaid, and treat with the perſon who hath the right, for the dividing ſuch pariſh, and the tithes and dues thereunto belonging, to take effect after the firſt voidance, and for ſettling the right of patronage of each new church.

Sect. 12. Such ſettlement ſhall bind infants, *&c.*

Sect. 14. Until ſuch ſettlement can be made of the right of patronage in every new pariſh, the crown ſhall preſent upon any avoidance.

Sect. 15. The rectors of every new church (except the preſent preacher in a chapel) ſhall be preſented, inſtituted, collated, and inducted, as other rectors are; and they and the church-wardens ſhall be ſubject to the ordinary.

Sect. 16. This act ſhall not deprive the ſucceſſors of the rectors or vicars of the pariſh churches, out of which any part ſhall be taken, of any tithes, or other profits, until ſuch agreement for dividing the pariſh be made and inrolled.

Sect. 17. This act ſhall not prejudice any proprietor of a chapel made a pariſh church, or his intereſt in any pews, without his conſent under hand and ſeal.

Sect. 18. If any proprietor ſhall ſell his intereſt in a pew in any chapel, it ſhall be ſold only to an inhabitant of the pariſh.

Sect. 19. The firſt church-wardens, overſeers of the poor, and ſurveyors, and other pariſh officers, of every new pariſh, ſhall be elected by the commiſſioners, out of the inhabitants, within a month after the conſecration of the church; and all ſucceeding pariſh officers ſhall be choſen and ſworn yearly in every new pariſh, according to law.

Sect. 20. The commiſſioners, with the conſent of the ordinary, may, by writing inrolled in chancery, name a number of the inhabitants of each new pariſh to be veſtrymen, who ſhall have the ſame power as the veſtrymen of the pariſh out of which the new pariſh is taken; and if there are no ſelect veſtrymen in that pariſh, then as the veſtrymen of the pariſh of *St. Martin in the Fields* in *Middleſex* now have; and upon the death or removal, *&c.* of any veſtryman, the reſt may chuſe another, being an inhabitant and houſholder.

Sect. 21. All parochial cuſtoms, *&c.* uſed in any pariſh ſhall, notwithſtanding ſuch diviſion, continue in both pariſhes.

Sect. 22. The commiſſioners, with the conſent of the miniſters, church-wardens and overſeers of the poor, and of the veſtry, or of twenty of the principal inhabitants where there is no ſelect veſtry, from which pariſh any part ſhall be taken, and of the pariſh to which it ſhall be appointed, or elſe the reſpective miniſters, pariſh officers, veſtrymen or principal inhabitants, with conſent of the ordinary, by writing inrolled in chancery, may make a perpetual diviſion of ſuch pariſhes as to church rates, the poor, highways, and other pariſh rates; and may ſettle any annual ſum, or conſideration in reſpect thereof, or for equality of ſuch diviſion.

Sect. 23. Until ſuch agreement be made, the pariſh rates ſhall be aſſeſſed and levied through all parts which belong to ſuch preſent pariſh.

Sect. 24. The pariſh officers, with the veſtry or principal inhabitants of each pariſh, may meet every year on *Tueſday* in *Eaſter* week, or oftner, upon notice given on the *Sunday* before, and after morning ſervice aſſeſs the rates for the poor, *&c.* and other pariſh rates, and apportion the ſaid rates upon every part of ſuch preſent pariſh ſo divided; which rates ſhall be aſſeſſed and collected in each diſtrict by the proper officers, who ſhall diſtribute the

the rates in reaſonable proportions for every diſtrict, for the relief of the poor, *&c.* and other pariſh rates within ſuch diſtrict.

Sect. 25. When ſuch yearly agreements ſhall not be made for diſtributing ſuch rates, the pariſh officers for the diſtrict then remaining to ſuch preſent church may aſſeſs and collect of the inhabitants, through the limits of ſuch pariſh, all rates and taxes, as they might have done before any diviſion.

Sect. 26. This act ſhall not invalidate any eccleſiaſtical law of the church of *England*, or deſtroy any of the rights of the biſhop of *London* or any other local ordinary, or any archdeacon, chancellor or official.

Sect. 27. He and they may viſit, inſtitute and exerciſe eccleſiaſtical juriſdiction in all pariſhes to be erected or divided, as in any other pariſh.

Sect. 30. The monies, to be iſſued in purſuance of this and the former act for building churches, ſhall be iſſued without fee.

Sect. 31. No burial ſhall be in or under any of the churches intended to be built. And the commiſſioners may ſettle what ſum ſhall be paid to the rector and church-officers for burials in the churchyards.

Stat. 12 *Ann. ſtat.* 1. *cap.* 17. *ſect.* 2. The New church in the *Strand*, after it is finiſhed, ſhall be deemed one of the fifty churches to be built in purſuance of the act 9 *Ann. cap.* 22, *&c.*

Sect. 4. In every new church to be erected in purſuance to the act 10 *Ann. cap.* 11. within *Stepney* pariſh, the firſt rector ſhall be nominated by the principal and ſcholars of *Brazen Noſe College* in *Oxford*, and in every chapel in the ſame pariſh which ſhall be converted into a parochial church.

Stat. 1 *Geo.* 1. *cap.* 23. *ſect.* 2. All monies which ſhall be raiſed by the duty of 3 *s. per* chalder upon coals imported into the *Thames*, from the

27th of *September* 1724, to the 28th of *September* 1729, by virtue of this act, ſhall be brought into the Exchequer; and are appropriated for the providing maintenances for the miniſters in the new churches to be erected in and about *London* and *Weſtminſter*, and ſhall be iſſued in ſuch manner as ſhall be directed by parliament.

Sect. 4. The king may by letters patent appoint commiſſioners, who, or any five of them, ſhall have power to execute all the powers, *&c.* in the ſaid acts; and alſo to inform themſelves in what manner a due maintenance may be provided for the ſaid miniſters.

Stat. 4 *Geo.* 1. *cap.* 14. *ſect.* 1. The commiſſioners appointed by virtue of the two acts 9 *Ann. cap.* 22. and 10 *Ann. cap.* 11. ſhall cauſe the church of St. *Giles's in the Fields*, to be rebuilt, and the ſaid church ſhall be taken as one of the fifty new churches.

Sect. 2. The profits of the fourth gallery ſhall be applied to the uſe of the poor of the ſaid pariſh.

Stat. 5 *Geo.* 1. *cap.* 9. *ſect.* 4. All the monies ariſing by the duties on coals imported into the port of *London* after *Lady-day* 1719. and before *Lady-day* 1751. ſhall be paid into the Exchequer, and appropriated to the ſeveral uſes in this act preſcribed.

Sect. 5. For raiſing the ſum of 360000 *l.* in ſuch proportions as ſhall be needful for building the ſaid churches, a yearly fund of 21000 *l.* ſhall after *Lady-day* 1719. during thirty-two years, be a ſecurity for paying principal and intereſt of the ſaid 360000 *l.*

Sect. 6. The treaſury are to direct the officers of the Exchequer to receive by way of loan ſuch ſums, as the commiſſioners ſhall think neceſſary for the buildings, repairs and other purpoſes, by the acts 9 *Ann. cap.* 22. and 10 *Ann. cap.* 11. intended,

and to allow intereſt at 4 *l. per cent.* and the monies ſo lent ſhall be tax-free; and the lenders ſhall have tallies of loans, and orders for payment; the principal to be paid in courſe, and the intereſt every three months; and no fee ſhall be taken for payment; and the ſaid fund of 21000*l. per annum* ſhall be liable to ſatisfy ſuch orders without being diverted to any other uſe, on pain of treble coſts to the party grieved; and ſuch orders ſhall be aſſignable according to the courſe of the Exchequer.

Sect. 7. The monies ariſing on credit of the ſaid 21000*l. per annum*, and all the monies of the ſaid fund ſhall be applied towards building of churches, *&c.* repairing *Weſtminſter-Abbey*, finiſhing *Greenwich-Hoſpital*, making proviſion for miniſters, *&c.*

Sect. 8. The principal of the loans, together with the monies ſupplied out of the fund, ſhall not exceed 360000*l.*

Sect. 9. The treaſury are to iſſue out the monies ariſing by loan, and out of the monies of ſuch fund, ſuch ſums as the commiſſioners ſhall think neceſſary; which ſhall be paid to ſuch perſon as his majeſty ſhall appoint to be the treaſurer, who is to diſburſe the ſame according to ſuch orders as he ſhall receive from the commiſſioners, and is to be accountable in the Exchequer, and ſhall give ſecurity, to be approved by the treaſury.

Sect. 11. All the powers and clauſes in the ſaid acts of 9 *Ann. cap.* 22. and 10 *Ann. cap.* 11. and 1 *Geo.* 1. *cap.* 23. or in any other act for building the ſaid churches, ſhall continue.

Sect. 12. The king may appoint commiſſioners to execute the powers in the ſaid recited acts and in this act, touching the building and repairing of the ſaid churches.

Stat. 12 *Geo.* 1. *cap.* 39. *ſect.* 1. The ſum of 2500*l.* part of the ſum of 360000*l.* by the act 5 *Geo.* 1. *cap.* 9. appointed to be raiſed, ſhall be allotted for the rector of the New church of St. *Mary*

le

le Strand, and the treaſurer ſhall diſpoſe of the ſaid 2500 *l.* according to ſuch orders as he ſhall receive from the commiſſioners, in purchaſing lands, *&c.* to be conveyed to the rector of the ſaid New church and his ſucceſſors for ever; and in the mean time place out the ſame by order of the commiſſioners, on real ſecurities or publick funds.

Sect. 2. And for a farther proviſion for the rector of *Saint Mary le Strand*, the ſum of 125 *l. per ann.* ſhall be raiſed by an equal pound rate on the inhabitants (except the rector, and ſuch as ſhall not pay to the poor) within the diſtrict appointed for the pariſh of St. *Mary le Strand:* And for that purpoſe the rector, churchwardens and veſtry, are yearly on *Eaſter Tueſday*, or within fourteen days after, on notice given in the church after divine ſervice the *Sunday* before, to make an aſſeſſment on the inhabitants for raiſing by an equal pound-rate ſuch yearly ſum for the maintenance of the rector; and if the veſtry ſhall neglect to make ſuch aſſeſſment, it ſhall be lawful for the churchwardens alone at any time within fourteen days after ſuch neglect to make ſuch aſſeſſment.

Sect. 3. If the churchwardens ſhall neglect to make the aſſeſſment, they ſhall forfeit 100 *l.* to be recovered by any perſon who will ſue.

Sect. 4. The aſſeſſment ſhall be allowed by two juſtices of *Middleſex*, and the ſums ſhall be collected by perſons nominated by the veſtry or churchwardens; and the collector refuſing to act ſhall forfeit to the crown 100 *l.* to be recovered as above.

Sect. 5. If any perſon ſhall refuſe to pay the ſum aſſeſſed, it ſhall be lawful for the collector by warrant of two juſtices to levy the ſame by diſtreſs and ſale of goods.

Sect. 6. If any perſon ſhall find himſelf grieved by any aſſeſſment, on complaint made and notice in writing, within ſix days after demand of the monies aſſeſſed, given to the collectors, the juſtices of

of peace of *Middleſex* at their next quarter-ſeſſions are to hear and determine the ſame.

Sect. 7. Where any houſes, *&c.* ſhall be unoccupied, and where any inhabitants ſhall remove during the continuance of the aſſeſſment, the monies aſſeſſed not exceeding one quarterly payment ſhall be levied on the next tenant.

Sect. 8. The churchwardens, within fourteen days after every aſſeſſment and the appeals determined, ſhall make two tranſcripts thereof in parchment and ſubſcribe the ſame, and within two days ſhall deliver one of them to the rector, and the other ſhall be ſet up for three weeks in the moſt publick place in the church, and afterwards remain in the veſtry.

Sect. 9. The produce of the ſaid yearly ſum of 125*l.* ſhall be the annual maintenance of the rector, over and above ſuch ſurplice-fees as belong to the rector (*Eaſter* offerings excepted), and the houſe for the habitation of the rector, and over and above all gifts and benefits, not exceeding in the whole the yearly value of 200*l.*

Sect. 10. The rectory of St. *Mary le Strand* ſhall not be held in commendam.

Sect. 11. If the commiſſioners ſhall purchaſe a houſe for the habitation of the rector without the bounds of the pariſh (but near thereunto), the houſe ſhall, after the inrolment in Chancery of the bargain and ſale, whereby the ſame ſhall be conveyed, be deemed part of the pariſh of St. *Mary le Strand.*

Sect. 12. The pariſh clerk of St. *Mary le Strand* ſhall be a member of the corporation of pariſh clerks.

Sect. 13. If any ſuit be commenced for any thing done in purſuance of this act, the defendant may plead the general iſſue, *&c.* and on verdict, *&c.* ſhall recover treble coſts.

Sect. 14. This act ſhall be a publick act.

Stat.

Stat. 13 *Geo.* 1. *cap.* 35. *ſect.* 1. The pariſhioners of the pariſh of St. *Catharine Cree-Church*, otherwiſe *Chriſt-Church*, *London*, ſhall pay to the maſter and fellows of *Magdalen College*, *Cambridge*, during their eſtate in fee in the impropriate rectory and tithes of the ſaid pariſh, 150*l. per ann.* clear of deductions, at the four uſual feaſt-days, in lieu of all tithes, oblations, offerings, fruits, profits and advantages, from the owners or occupiers of any houſes, *&c.* within the ſaid pariſh, and for the impropriator's providing the pariſh with a curate.

Sect. 3. If default ſhall be made in payment of the ſaid yearly ſum of 150*l.* thirty days after any of the ſaid feaſts; oath of ſuch default being made before any of the barons of the Exchequer, or before the lord mayor of *London*, or any juſtice of peace for that city, it ſhall be lawful for the ſaid baron, *&c.* to ſummon ſuch perſons as ſhall have been appointed to collect the ſaid monies, and ſuch other perſons as they ſhall think neceſſary, and to inquire of ſuch default; and if ſuch collector hath received any monies, and neglected to pay the ſame, it ſhall be lawful for the ſaid baron, *&c.* to iſſue warrants to diſtrain the goods of ſuch collectors, towards ſatisfaction of ſuch money, and to ſell ſuch goods; and for want of goods, to iſſue their warrant for impriſoning ſuch deficient collectors, till payment be made: And if ſuch collector ſhall not ſatisfy the monies for which he ſhall ſtand committed, within ten days, or if the duties ſhall not be paid to the collector, it ſhall be lawful for the ſaid maſter and fellows, *&c.* to diſtrain for the arrears, upon any the goods of the pariſhioners; and the goods ſo diſtrained to keep four days, to be appraiſed by two perſons, and ſold for payment of the money. Provided, That no diſtreſs be made on the goods of any perſon for more than 5*l.* Provided, That ſuch payment ariſing by diſtreſs, ſhall in no wiſe diſcharge the impriſonment of any collector

lector till payment be made to a veſtry; which being paid ſhall be applied in eaſe of the next rate: And if the goods of any inhabitant be diſtrained, the collector ſhall ſatisfy the money, together with his charges, out of the firſt money that ſhall come to his hands.

Sect. 4. The churchwardens and veſtry are required yearly on the 25th of *March* (notice being given in the church the *Sunday* before) to make an aſſeſſment by a pound-rate, upon all occupiers of houſes or tenements in the pariſh, for raiſing the ſaid yearly ſum of 150 *l.* in lieu of tithes, *&c.* which rates ſhall be ſubſcribed by the alderman of the ward, or any two juſtices of peace for the city; and the ſums ſhall be collected quarterly, by ſuch perſons as ſhall by the veſtry be yearly appointed.

Sect. 5. If any perſon ſhall find himſelf aggrieved by any rate, on complaint to the alderman of the ward, or to any two juſtices of the peace for the city, within ten days after notice of ſuch rate given to the party aſſeſſed, the ſaid alderman or juſtices ſummoning the party and the churchwardens ſhall have power within five days to hear and determine the matter.

Sect. 6. If any perſon ſhall refuſe the office of collector (not being privileged from ſerving pariſh offices) it ſhall be lawful for the veſtry to impoſe a fine on ſuch perſon, not exceeding 10 *l.* which ſhall be levied by diſtreſs and ſale of goods, by warrant of the lord mayor or two juſtices of peace, to be applied to the uſe of the poor; and it ſhall be lawful for any veſtry to appoint other collectors inſtead of thoſe refuſing, dying, failing or removing.

Sect. 7. Collectors ſhall not be obliged to ſerve the office more than one year, and ſhall be exempted from the office of overſeer or collector for the poor.

Sect. 8. Every collector ſhall quarterly or oftner account for, and pay to the receiver appointed by the

the veſtry, all money collected over and above the ſaid 150*l.* and in caſe of neglect, the like remedy ſhall be had, as is provided for the recovery of the ſum; and ſuch overplus monies ſhall be diſpoſed of as the common ſtock of the pariſh.

Sect. 9. If any perſon ſhall neglect to pay the money aſſeſſed, four days after demand, or perſonal notice given, or left in writing at the place of abode of ſuch perſon, then (the time of appeal being lapſed, or the appeal determined) it ſhall be lawful for the collector in the day-time to enter into any houſe of ſuch perſon (taking to his aſſiſtance the conſtable or other peace officer) to diſtrain the goods of ſuch perſon, and to ſell the ſame for ſatisfaction of ſuch rate.

Sect. 10. If any loſs or deficiency ſhall happen in the ſaid rates, the ſame ſhall be made good by reaſſeſſment to be added to the next rate; and if the churchwardens and veſtry ſhall neglect to make ſuch rates and to appoint collectors twenty days, it ſhall be lawful for ſuch churchwardens alone within ten days after ſuch neglect to make ſuch rates, and to appoint collectors; and if ſuch churchwardens ſhall neglect, *&c.* they ſhall be committed to priſon till ſuch rates, *&c.* be made, and collectors appointed.

Sect. 11. The inhabitants ſhall repair the chancel of the ſaid pariſh church, and receive all profits from burials in the church, and all other profits which ſhall ariſe by the chancel; the cuſtomary dues payable to the curate excepted.

Sect. 12. The yearly ſum of 70*l.* ſhall be paid by the maſter and fellows of *Magdalen College* in *Cambridge*, out of the ſums to be paid to them by this act, to the officiating curate, clear of all deductions, by four equal payments on the feaſt days before-mentioned; and it ſhall be lawful for the perſons appointed to collect the rates, out of the mo-

monies collected, to pay the ſaid 70 *l. per annum* to ſuch curate; and the curate ſhall take to his own uſe the ſurplice fees.

Sect. 13. If any action ſhall be commenced againſt any perſon for what he ſhall do in purſuance of this act, he may plead the general iſſue, and on a verdict, *&c.* ſhall recover treble coſts.

Sect. 14. This act ſhall be a publick act.

Stat. 1 *Geo.* 2. *cap.* 15. *ſect.* 12. For raiſing a maintenance for the rector of the New church in the Hamlet of *Spittlefields*, within the pariſh of St. *Dunſtan Stepney*, the ſum of 3000*l.* part of the monies intended by the act 1 *Geo.* 1. *cap.* 23. to be raiſed for proviſion for miniſters of the fifty New churches, ſhall be allotted for the ſhare which the rector of the New church ſhall have.

Sect. 2. In lieu of a certain ſum of money, to be by the commiſſioners appointed to be paid to the rector for every burial, and towards raiſing the yearly ſum of 125 *l.* agreed to be raiſed within the diſtrict, and paid towards the maintenance of the rector, there ſhall be paid to the churchwardens of the New pariſh the ſums following, *viz.* for every burial in the churchyards, ſuch ſums as the veſtry ſhall with the conſent of the ordinary ſettle, not exceeding 30 *s.* nor leſs than 2 *s.* (fees on the burial of any perſon who received alms, to be paid by the overſeers of the poor); and for the liberty of making vaults, or ſetting up any monument, ſuch ſums as the veſtry ſhall appoint; and from the conſecration of the church, and the induction of a rector, it ſhall be lawful to depoſit any corps in the vaults under the church or ſteeple, ſo as the floor of ſuch vaults be not broke; and ſuch money as ſhall be appointed by the veſtry for depoſiting the corps ſhall be paid to the churchwardens towards the maintenance of the rector.

Sect. 3.

Sect. 3. It ſhall be lawful for the churchwardens to make vaults, and ſet up monuments, and depoſit corps, without any hindrance by the rector.

Sect. 4. Towards the further maintenance of the rector, the churchwardens ſhall yearly pay to him 125 *l.* without deduction for taxes, at the four uſual feaſts, out of the monies received in purſuance of this act; and if ſuch monies ſhall be deficient, then out of any publick monies belonging to the pariſh, not ariſing by any poor rate or pound rate, as the veſtry ſhall direct, which other money ſhall be made good out of the next ſurplus of the burial monies.

Sect. 5. If default be made in payment of the yearly ſum of 125 *l.* to the rector twenty-one days after any of the days of payment, the rector may recover the ſame againſt the churchwardens by action of debt, *&c.*

Sect. 6. It ſhall be lawful for the rector, inſtead of proceeding by action, to make his complaint of ſuch default to any one juſtice of peace for *Middleſex*; and on ſuch complaint, and oath made of the ſame in arrear, the juſtice by warrant may ſummon the perſons making default, at ſuch time as he ſhall appoint, not exceeding four days from the date of the warrant; and if ſufficient cauſe ſhall not be ſhewn (oath being made of due notice of ſuch ſummons, in caſe the party concerned ſhall not attend) the juſtice may by warrant cauſe all ſuch monies in arrear to be levied by diſtreſs and ſale of goods, the coſts to be aſcertained on oath before the juſtice; and if ſufficient diſtreſs cannot be had, the juſtices are to commit the offenders to the common gaol till they have paid all arrears.

Sect. 7. All ſucceeding churchwardens ſhall be liable to make good out of any pariſh monies in their hands all arrears of the ſaid yearly ſum of 125 *l.* as aforeſaid, ſo as ſuch arrear do not exceed one year's payment, and ſo as ſuch action be commenced,

menced, or complaint made againſt the ſucceeding churchwardens, within three months after their being ſworn into the office.

Sect. 9. The rector, churchwardens and overſeers for the poor of the New pariſh, and all perſons who have ſerved or paid fines for the office of churchwarden or overſeer of the poor, for the hamlet of *Spittlefields*, or the New pariſh, ſo long as they ſhall continue houſholders within the pariſh and pay to the poor's rate, ſhall be the veſtrymen of the New pariſh, and ſhall meet from time to time on notice to be publiſhed in the church by order of the rector, churchwardens or overſeers, on the Lord's day next preceding, after divine ſervice; and the ſaid veſtrymen ſhall elect a lecturer, as alſo churchwardens, ſideſman, pariſh clerk, and all other officers, who were uſually choſen for the hamlet; and alſo elect and put out the Sexton, Grave-diggers and all other officers and ſervants to be employed about opening the pews or otherwiſe in the church; and the lecturers ſhall be admitted by the rector to the uſe of the pulpit.

Sect. 10. The diſtrict ſet out for a New pariſh ſhall be a diſtinct pariſh, the name of which ſhall be given to the church in the act of conſecration; and the inhabitants ſhall be diſcharged as well againſt the rector of the New church, as againſt the rector of the pariſh of *Stepney*, from all ſmall tithes, *Eaſter*-offerings, garden penies, and all other duties ariſing within the New pariſh.

Sect. 11. All great tithes, or *Modus* or compoſition in lieu thereof, within the New pariſh, ſhall continue to be paid to the principal and ſcholars of *King's Hall* and college of *Brazen Noſe* in *Oxford*, or the perſons to whom they belong.

Sect. 14. The proviſions hereby made for the rector ſhall be the annual maintenance of the rector, over and above ſurplice fees, and the houſe for his habitation, and over and above all gifts and

bequeſts to the rector; Provided, That no ſurplice fees upon any burial ſhall be taken by the rector, unleſs where he ſhall be deſired to perform the burial office or part thereof in the church, and the corpſe be carried into the church, and then only ſuch ſurplice fees as ſhall be ſettled by the veſtry with the conſent of the ordinary, who are alſo to ſettle all other fees payable to each other officer belonging to the church.

Sect. 18. The payments for repairing the highways within the pariſh of *Stepney* ſhall be the ſame as they were before this act.

Stat. 2 *Geo.* 2. *cap.* 30. *ſect.* 1. Towards raiſing a maintenance for the rector of the New church in the hamlet of *Wapping Stepney*, in the pariſh of St. *Dunſtan Stepney* in *Middleſex*, the ſum of 3000*l.* ſhall be allotted as the ſhare which the rector ſhall have out of the monies intended by the act 1 *Geo.* 1. *cap.* 23.

Sect. 2. For the better maintenance of the rector, there ſhall be paid to the churchwardens, for every burial in the church-yards, ſuch ſums as the veſtrymen, with conſent of the biſhop, ſhall ſettle, not exceeding 30*s.* or leſs than 2*s.* (fees for burials of the poor to be paid by the overſeers) and for liberty of making vaults or monuments in the church-yard or church, ſuch ſums as the veſtrymen ſhall appoint; and corps may be depoſited in any vaults belonging to the church or ſteeple, ſo as the floor be not broken up; and the money for depoſiting the corps ſhall be paid to the churchwardens towards the maintenance of the rector.

Sect. 4. Towards the better maintenance of the rector, the churchwardens ſhall pay him the yearly ſum of 100*l.* tax-free, at the four uſual feaſts, out of the monies received in purſuance of this act.

Sect. 9. The rector, churchwardens and overſeers of the poor, and all perſons who ſhall pay 2*s.*

per

per month to the poor, and no others, ſhall be veſtrymen of the New pariſh, and ſhall meet, *&c.*

Stat. 3 *Geo.* 2. *cap.* 3. *ſect.* 1. Towards raiſing a maintenance for the rector of the New church of St. *Mary* of *Stratford Bow* in the county of *Middleſex*, the ſum of 3500 *l.* part of the monies intended by the act 1 *Geo.* 1. *cap.* 23. ſhall be allotted as the ſhare which the rector of the ſaid New church ſhall have out of the ſame monies; and if no purchaſe can be obtained in three years, the rector ſhall not be intitled to any other intereſt than 3 *l. per cent.* till ſuch purchaſe can be obtained.

Sect. 2. For the better maintenance of the rector, the churchwardens are impowered to raiſe monies on the pews in the church and chancel, by letting them to inhabitants, not to exceed 46 *l. per annum*, and alſo the ſums following, *viz.* for every burial in the church-yard, ſuch ſums as the veſtry, with the allowance of the ordinary, ſhall appoint, not exceeding 40 *s.* nor leſs than 3 *s.* for every burial, (ſuch fees for the burial of any perſon who received alms from the pariſh to be paid by the overſeers,) and for liberty to make any vault, or ſet up any monument in the church or cemetery, ſuch ſums as the veſtry ſhall appoint: And it ſhall be lawful to depoſit corps in any vault, under the church or ſteeple, ſo as the floor of ſuch vault be not broken; and the money for depoſiting the corps ſhall be paid to the churchwardens for the better maintenance of the rector.

Sect. 4. The church-wardens ſhall yearly pay, out of any pariſh monies in their hands, to the rector, the ſum of 40 *l.* without deduction for taxes, at the four uſual feaſts.

Sect. 7. The rectors of the New pariſh of *Saint Mary of Stratford Bow* ſhall be intitled to all ſurplice fees and perquiſites, over and above the houſe for habitation; and all gifts and profits, ſmall tithes, *Eaſter* offerings, and garden penies, excepted.

Sect. 9. The New pariſh ſhall be deemed a diſtinct pariſh, by the name of *St. Mary of Stratford Bow*; and be divided from the pariſh of *St. Dunſtan Stepney*, and ſhall be diſcharged from all ſmall tithes, *Eaſter* offerings, garden penies, and all other dues.

Stat. 3 *Geo.* 2. *cap.* 17. *ſect.* 1. Towards raiſing a maintenance for the rector of the New church in the hamlet of *Limehouſe*, in the pariſh of *St. Dunſtan Stepney* in *Middleſex*, and part of the hamlet of *Ratcliff*, the ſum of 3500 *l.* part of the money intended by the act 1 *Geo.* 1. *cap.* 23. ſhall be allotted for the ſhare which the rector ſhall have.

Sect. 5. Towards making further proviſion for maintenance of the rector, the church-wardens ſhall pay to ſuch rector, out of any pariſh monies, the yearly ſum of 60 *l.* without deduction for taxes, at the four uſual feaſts.

Sect. 10. The rector, church-wardens and overſeers, and all other perſons who ſhall pay 12 *s.* each book to the poor of the New pariſh, and none others, ſhall be veſtrymen, and ſhall meet and elect a lecturer.

The following part of this act is to the ſame effect of the act for *Spittlefields* church, which ſee before, in *Stat.* 2 *Geo.* 2. *c.* 10. *ſect.* 10. except the following ſection.

Sect. 20. The inhabitants of that part of the hamlet of *Ratcliff* which is intended to be part of the New pariſh, who ſhall pay 2 *s.* 6 *d. per* month to the poor's rates of *Ratcliff*, ſhall be veſtrymen of the New pariſh; but they ſhall not intermeddle in any affairs which concern the hamlet of *Limehouſe*, in thoſe reſpects wherein that hamlet and the ſaid part of the hamlet of *Ratcliff* are to continue diſtinct.

Stat. 3 *Geo.* 2. *cap.* 19. *ſect.* 1. Towards raiſing a maintenance for the rector of the new church near *Bloomſbury-market*, in the pariſh of *St. Giles in the fields*

fields in *Middleſex*, the ſum of 3000 *l.* part of the monies intended by the act 1 *Geo.* 1. *cap.* 23. ſhall be allotted for the ſhare which the rector ſhall have.

Sect. 2. The inhabitants of *St. Giles's in the fields* ſhall pay to the treaſurer of the commiſſioners 1250 *l.* and the ſaid treaſurer is to lay out the ſame as he is to lay out the before mentioned 3000 *l.* and ſhall pay the produce of the ſaid 1250 *l.* to the rector of the New church, for his better maintenance; and if no purchaſe can be had within five years, the rector ſhall not be intitled to any other intereſt than 3 *l. per cent.*

Sect. 3. The annual profits of the lands, *&c.* to be purchaſed with the ſaid ſums of 3000 *l.* and 1250 *l.* ſhall be the annual maintenance of the rector of the New church, over and above ſurplice fees, *Eaſter* offerings, and other dues, and the houſe for his habitation, and over and above all gifts, not exceeding the yearly value of 200 *l.*

Sect. 5. The commiſſioners, with the conſent of the veſtry of the New pariſh, ſhall aſcertain what ſums ſhall be paid to the rector, and each officer, for every burial; which ſums ſhall be regiſtred in Doctors commons.

Sect. 6. The vaults and rooms under the church, excepting thoſe belonging to the rector's dwelling houſe, and alſo the veſtry room, together with the ſeats in the church, ſhall be veſted in the church-wardens, for the public uſes of the New pariſh, under the directions of the veſtry: but the vaults ſhall not be diſpoſed of, or applied to any uſe, without the conſent of the rector.

Sect. 10. The lecturer, or afternoon preacher, for the New pariſh ſhall be elected by the rector and veſtrymen in the veſtry room; and if there ſhall be an equality of voices, the perſon preſiding ſhall have a caſting vote: and the lecturer ſhall be

permitted by the rector to have the use of the pulpit.

Sect. 11. There shall not be hung up in the steeple of the new church more than one bell.

Sect. 13. The church-wardens, overseers of the poor, and other parish officers for the New parish, shall be annually chosen, as such respective officers are for the parish of *St. Giles in the fields*; and all rates for the poor of both parishes shall be made jointly; and the workhouse shall be for the joint use of both parishes.

Sect. 14. All rights are saved to the most noble *Wriothesly* duke of *Bedford*.

Sect. 15. If any action be commenced for any thing done in pursuance of this act, it shall be brought within three months after the fact, and shall be laid in *Middlesex*; and the defendant may plead the general issue, *&c.* and on a verdict, *&c.* recover treble costs.

Sect. 17. This act shall be a public act.

Stat. 3 *Geo.* 2. *c.* 33. *sect.* 1. The sum of 3500 *l.* part of the monies intended by the act 1 *Geo.* 1. *cap.* 23. shall be allotted for the share, which the minister of the New church in the parish of *St. Nicholas Deptford*, in the counties of *Kent* and *Surry* shall have.

Sect. 4. For further provision for the maintenance of the rector, the church-wardens shall pay him the yearly sum of 70 *l.* out of any parish monies in their hands, at the four usual feast-days, without abatement for taxes, *&c.* and if the monies fall short, then out of any public monies in their hands, not arising by any poors or pound rate, as the vestry shall direct; to be replaced out of the next surplus arising by burials.

Sect. 5. In default of payment of the said yearly sum of 70 *l.* twenty-eight days after the same ought to be paid, the rector may sue for the same against the church-wardens, *&c.*

Sect.

Sect. 8. The miniſter, church-wardens, overſeers for the poor, and all other pariſhioners, who ſhall pay to the poor, ſhall be the veſtrymen of the New pariſh, and ſhall meet on notice in the church, by order of the rector, church-wardens and overſeers, or either of them, on the preceding lord's day after divine ſervice; and ſhall elect church-wardens, ſideſmen, pariſh clerk, and all other officers for the ſaid pariſh; and alſo may elect and amove the clerk, ſexton, grave-digger, and all other officers and ſervants employed in opening pews or otherwiſe about the church; and may alſo nominate a lecturer, who ſhall be admitted by the rector to have the uſe of the pulpit.

Sect. 9. The diſtrict ſet out for a New pariſh ſhall be a diſtinct pariſh, divided from the pariſh of *St. Nicholas Deptford*, and ſhall be diſcharged from payment of *Eaſter* offerings, garden penies, and all other dues.

Sect. 10. If any perſon ſhall be aggrieved by any rate, he may appeal to the quarter-ſeſſions of *Kent* or *Surry*, as the premiſſes aſſeſſed ſhall lie.

Sect. 11. All tithes ariſing within the new pariſh, which uſually were the property of the vicar of the old pariſh, ſhall be continued to him and his ſucceſſors.

Sect. 12. The miniſter and his ſucceſſors, and other perſons having occaſion to go to the houſe built for the miniſter, ſhall have liberty to paſs through the church-yard, by ſuch road as the veſtry ſhall appoint; which road ſhall not be leſs than twenty feet wide, from *Butt-lane* to the miniſter's houſe.

Sect. 13. The proviſions hereby made for the miniſter, *&c.* ſhall be the annual maintenance of the rector of the ſaid church, over and above ſurplice fees, and the houſe for his habitation; and over and above all gifts to him; but no ſurplice fees upon burials ſhall be demanded, unleſs where

he ſhall be requeſted to perform the burial office, or part thereof, in the church, and the corps be carried into the church, then only ſuch fees as ſhall be ſettled by the veſtry, with the allowance of the ordinary; who are to ſettle all fees payable to each officer belonging to the church.

Sect. 15. When the vicarage of the old pariſh church ſhall become vacant, the firſt rector of the New church ſhall be nominated by his majeſty; and all ſucceeding rectors of the New church ſhall be preſented by the patron of the old church.

Sect. 16. The rectory of the new pariſh ſhall not be held *in commendam.*

Sect. 17. The church-wardens ſhall provide three palls for burying the dead in the church-yard or vaults under the church, and ſhall take for the uſe of them not exceeding 10*s.* and no perſon ſhall bring any pall into the church-yard without paying to the church-wardens, not exceeding 10*s.* which ſhall be applied as the veſtry ſhall appoint.

Sect. 19. All donations that have been given to the pariſh of *Saint Nicholas Deptford*, ſhall be equally divided, for the benefit of the Old pariſh and the New.

Sect. 21. All rates for the poor of both pariſhes ſhall be raiſed by two moieties, *viz.* one out of the Old pariſh, and the other out of the New; and the workhouſe and houſe of correction is to be for the joint uſe of both pariſhes.

Sect. 22. The two pariſhes ſhall be jointly ſubject for repairing the roads in the upper part of the pariſh of *Deptford*, which is a diſtrict for the New pariſh.

Sect. 23. If any action be commenced for any thing done in purſuance of this act, the defendant may plead the general iſſue.

Sect. 24. This act ſhall be a public act.

Sect. 26. All glebe land that did belong to the pariſh of *St. Nicholas Deptford*, ſhall be veſted in the church-wardens of the New pariſh, to be applied

plied toward raiſing the 70 *l. per annum*, to be paid by the church-wardens to the rector of the New pariſh.

Stat. 4 *Geo.* 2. *cap.* 20. *ſect.* 1. The church of *Graveſend* ſhall be rebuilt as one of the fifty new churches directed to be built by the acts 9 *Ann. cap.* 22. and 10 *Ann. cap.* 11. and it ſhall be lawful for the commiſſioners to pay 5000 *l.* to be diſpoſed of according to the direction of the mayor of *Graveſend* and others, truſtees for the rebuilding the ſaid pariſh church.

Stat. 5 *Geo.* 2. *cap.* 4. *ſect.* 1. The church of *Woolwich* ſhall be rebuilt as one of the fifty new churches; and it ſhall be lawful for the commiſſioners to pay 8000 *l.* according to the direction of the right honourable the lord *Vere Beauclerk* and others, truſtees for rebuilding the ſaid church.

Stat. 6 *Geo.* 2. *cap.* 8. *ſect.* 1. The church of *St. George the Martyr* in *Southwark* ſhall be rebuilt as one of the fifty new churches; and the commiſſioners are required to pay 6000 *l.* to the order of the right honourable the earl of *Ailsford* and others, truſtees for rebuilding the ſaid church.

Stat. 6 *Geo.* 2. *cap.* 11. *ſect.* 1. The ſum of 3500 *l.* part of the monies intended by act 1 *G.* 1. *cap.* 23. to be applied for the making proviſion for the miniſters of the fifty new churches, ſhall be allotted for the ſhare which the rector of the new pariſh church near *Horſley-down* (taken out of *St. Olave*'s pariſh) ſhall have; and the treaſurer of the commiſſioners is to lay out the ſaid ſum in purchaſing lands.

Sect. 2. Out of the money appropriated for building the ſaid fifty new churches, there ſhall be iſſued ſuch ſums, not exceeding 1100 *l.* as ſhall be neceſſary for building a dwelling houſe for the miniſter; and for paving the church-yard, and ſetting up gates and rails, *&c.*

Sect. 6. It ſhall be lawful for the church-wardens of the ſaid old and new pariſhes reſpectively, to make

make vaults, and ſet up monuments and grave ſtones in the church-yards; and for the church-wardens of the new pariſh to ſet up ſuch monuments in the new church, and depoſit corps in the ſame, without hindrance of the miniſter.

Sect. 7. The church-wardens of the new pariſh ſhall pay, out of any pariſh monies in their hands, unto the miniſter, the yearly ſum of 60 *l.* without deduction of taxes, at the four uſual feaſts.

Sect. 11. The miniſter, and all other pariſhioners occupying tenements of the yearly value of 10 *l.* as the ſame ſhall be rated to the land-tax, ſhall be veſtrymen, and ſhall meet from time to time, upon publick notice read in the church, by order of the miniſter, church-wardens and overſees, or either of them, on the lord's day next preceding, after divine ſervice: and the ſaid veſtrymen ſhall elect church-wardens and other officers, and elect, and put out, the ſexton, grave-diggers, and all other officers and ſervants, to be employed in opening the pews, or otherwiſe about the church, and exerciſe the ſame powers as they might have done in caſe they had been named veſtrymen by the commiſſioners; and may elect a lecturer if they think fit.

Sect. 12. The diſtrict ſet out for a new pariſh ſhall be a diſtinct pariſh from the pariſh of *St. Olave's, Southwark*, and ſhall be diſcharged as well againſt the miniſter of the new church, as againſt the rector of *St. Olave's*, from *Eaſter* offerings; and alſo be exempted from all other dues payable to the rector of *St. Olave's*.

Sect. 13. The proviſions hereby made for the miniſter of the new church ſhall be in lieu of all *Modus's*, *Eaſter* offerings, and other demands; excepting ſuch ſurplice fees, and other perquiſites as he ſhall be allowed by this act to receive; and ſuch other fees and perquiſites as the veſtry, with the allowance of the ordinary, ſhall appoint.

Sect.

Sect. 15. The rectory of the new intended pariſh ſhall not be taken or held *in commendam.*

Sect. 16. The church-wardens ſhall provide three palls for burying the dead, and ſhall for the uſe of the ſame demand any ſum not exceeding 10 *s.* nor leſs than 2 *s.* and no perſon ſhall bring any pall into the church-yard, unleſs ſuch perſon ſhall pay to the church-wardens ſuch ſum as they ſhall demand, not exceeding 10 *s.* which ſums ſo taken ſhall be applied as the veſtry ſhall appoint; provided that the palls belonging to *St. Olave's* may be uſed at any funeral in the burying-places that are to be uſed in common between the old and new pariſhes, without paying any fee to the church-wardens of the new pariſh.

Sect. 18. All the burying-grounds within the old and new pariſhes ſhall be held in common between both pariſhes, and the ſurplice fees for burials of perſons dying within the old pariſh, where the ſervice ſhall be performed by the miniſter of the old pariſh, or any other officiating for him, ſhall be paid to the rector of the old pariſh; and ſurplice fees for perſons dying within the new pariſh, where the ſervice ſhall be performed by the miniſter of the new pariſh, ſhall be paid to the rector of the new pariſh; and all other fees ſhall be paid to the church-wardens of ſuch of the diſtricts where the perſon buried did reſide; provided, that if any ſtranger ſhall be buried in either of the ſaid pariſhes, the fees for palls, and the burial fees, ſhall be equally divided between the two pariſhes.

Sect. 19. The inhabitants of the new pariſh ſhall be intitled, in common with the inhabitants of the old pariſh, to all benefits ariſing from the free ſchool.

Sect. 20. All donations that have been given to the pariſh of *St. Olave's Southwark*, ſhall be divided in manner following, *viz.* three fifths for the old pariſh, and out of the other two fifths, there ſhall be paid to the church-wardens of the old pariſh the yearly

yearly ſum of 29 *l.* free from taxes, for the benefit of the poor, and the reſidue of the ſaid two fifths ſhall be for the benefit of the new pariſh.

Sect. 21. The rector, and ſenior church-warden, of each of the pariſhes ſhall jointly collect the ſeveral charities and donations; and ſhall, with the conſent of the veſtry of each pariſh, make leaſes of the lands and tenements given for the charitable purpoſes in ſuch gifts and donations mentioned, as the church-wardens of *St. Olave's Southwark* might have done.

Sect. 22. The ſeveral church-wardens ſhall give half-yearly accounts of the charities to any two juſtices of the peace for *Surry*, not being inhabitants of either of the pariſhes, within ten days after the feaſt of the annunciation and St. *Michael*; and in caſe they ſhall not appear upon ſummons, the juſtices may iſſue a warrant for bringing the party offending before ſuch juſtice; and in caſe the party ſhall refuſe to account, ſuch juſtice may commit the perſon ſo refuſing to the county gaol, till he ſhall have accounted; and in caſe the party accounting ſhall neglect to pay the money in his hands as the juſtices ſhall direct, it ſhall be lawful for ſuch juſtices to iſſue warrants for levying the ſame on the goods of the offender, and to cauſe ſale to be made thereof, in caſe they ſhall not be redeemed within five days; and where goods of ſuch offender cannot be found, to commit ſuch offender to the county gaol, till ſuch money be paid, or until the major part of the veſtry ſhall deſire that the offender be diſcharged; but the party ſhall be at liberty to appeal to the next quarter-ſeſſions.

Sect. 23. The workhouſe and furniture, and the ground adjoining, ſhall be divided, *viz.* three fifth parts ſhall be the property of the old pariſh, and the other two fifths the property of the new pariſh, ſubject to the yearly rent of a pepper-corn, payable to the truſtees of the free-ſchool of *St. Olave's*

Southwark; and all perſons who ſhall obtain any ſettlement in that part of the workhouſe which ſhall be allotted to the old pariſh, ſhall be maintained by the old pariſh.

Sect. 26. If any action ſhall be commenced for any thing done in purſuance of this act, the defendant may plead the general iſſue.

Sect. 27. This act ſhall be a public act.

Stat. 6 *Geo.* 2. *cap.* 21. *ſect.* 1. The ſum of 3500 *l.* part of the monies applied for making proviſion for the miniſters of the fifty new churches, ſhall be allotted for the rector of the new church in *Old-ſtreet*.

Sect. 2. Towards raiſing the yearly ſum of 120 *l.* agreed to be raiſed within the lordſhip part of the pariſh of *Cripplegate*, for the maintenance of ſuch rector, there ſhall be paid to the church-wardens of the new pariſh, upon the burial of any perſon in the church-yards of the new pariſh, ſuch ſum of money as the veſtrymen ſhall, with the allowance of the ordinary, appoint; and for the liberty of making a vault, or ſetting up any monument, or grave-ſtone, ſuch money as the veſtrymen ſhall appoint; and it ſhall be lawful to depoſit any corps in the vaults under the church or ſteeple, ſo as the floor of ſuch vault be not broke.

Sect. 4. The church-wardens ſhall pay out of any pariſh monies in their hands, unto ſuch rector, the yearly ſum of 120 *l.* without deduction for taxes, at the four uſual feaſts.

Sect. 9. The rector, church-wardens and overſeers for the poor of the ſaid new pariſh, and all other perſons who have ſerved, or paid fines for offices for the ſaid diſtrict or new pariſh, ſo long as they continue houſholders within the pariſh, and pay to the poor's rate, ſhall be the veſtrymen of the ſaid pariſh; and the ſaid veſtrymen may elect a lecturer, as alſo church-wardens, ſideſmen, and all other officers for the pariſh; and alſo elect, and

and put out, the ſexton, grave-diggers, and other officers and ſervants.

Sect. 14. When the vicarage of the old pariſh church ſhall become vacant, the firſt rector of the new church ſhall be nominated by his majeſty, and all ſucceeding rectors of the ſaid new church ſhall be collated by the dean of *St. Paul's, London.*

Sect. 16. All charities and donations that have been given to the pariſh of *St. Giles, Cripplegate,* ſhall be enjoyed by the vicar or church-wardens of the preſent pariſh of *St. Giles Cripplegate,* and the church-wardens of the new intended pariſh, by ſuch proportions as they were before.

Sect. 17. The burying ground called *The bear and ragged ſtaff* burying ground, ſhall be to the ſole uſe of the old pariſh.

Sect. 19. The highways ſhall be repaired as by the laws now in being; and all money which ſhall be expended in repairing the ſame, ſhall be paid in the proportions following, *viz.* five eight parts by the new intended pariſh, and the other three eight parts by the old pariſh, commonly called the Freedom part.

Sect. 20. The pariſh clerk of the new pariſh ſhall be a member of the corporation of Maſters, wardens, aſſiſtants and brethren of the pariſh clerks.

Sect. 24. After the clerk's place of the old pariſh ſhall become vacant, the rector of the new pariſh ſhall pay to the vicar of the old pariſh of *St. Giles Cripplegate,* the yearly ſum of 10*l.* without deduction of taxes, at the four uſual days of payment; and in caſe any of the payments ſhall be behind twenty-one days, the vicar may ſue for the ſame againſt ſuch rector by action of debt.

Stat. 6 *Geo.* 2. *cap.* 25. *ſect.* 20. It ſhall be lawful for the commiſſioners of the treaſury to pay out of the monies reſerved for building fifty new churches, unto the ſubdean, treaſurer and ſteward

of the collegiate church of *St. Peter Weſtminſter*, 4000 *l.* for the repair of the ſaid collegiate church, and alſo to pay to the ſaid ſubdean, treaſurer and ſteward, the further ſum of 1200 *l.* for finiſhing the dormitory.

CHAP. XI.

Caſes concerning Tithes determined in the court of King's Bench, *by the earl of* Hardwicke, *and lord* Mansfield.

DEclaration in prohibition on a libel in the ſpiritual court, brought by the parſon againſt a farmer in his pariſh, for the agiſtment of cattle. The defendant, in diſcharge of the tithes demanded, pleaded two *Modus's*. The firſt was, that all the farmers and occupiers of the lands in queſtion, had, from time immemorial, at their own coſts and charges, mowed the lands, and had ſet out the tithe graſs into cocks; and that the parſon had accepted the ſaid tenth cock of hay, in lieu of all tithe due for agiſtment, and for the aftermath of thoſe lands for that year. The ſecond *Modus* was, to pay one penny for every cow, and one halfpenny for every calf, in lieu of all tithes due for the agiſtment of all cows and calves for that year. The cauſe was tried, and verdict given for the plaintiff in prohibition. And Mr. *Wilbraham*, for the parſon, moved in arreſt of judgment, and took exceptions to the *Modus's*. To the firſt he ſaid, this was a *Modus* pleaded in diſcharge of tithes, both for agiſtment of cattle, and of the aftermath; and therefore, though it be good for the agiſtment, yet if it fails for the hay, the *Modus* is bad. And though the now plaintiff had no occaſion to lay his *Modus* further than for the agiſtment, yet if he goes

Modus for a pariſh to make the tithe graſs into hay, held a good diſcharge of tithe of the aftermath.

goes further, and ſets out a bad *Modus*, it will viciate the whole. Nor can it be diſputed but that tithe is due *de jure* of the aftermath; and then the preſcription to make it into graſs cocks, in lieu of tithes of hay due on it, muſt be bad; for the making it into graſs cocks is no more than the law obliges every one to do. Secondly, he ſaid, the ſecond *Modus* was laid too large, and therefore void; for the preſcription is to pay one penny for every cow, in lieu of agiſtment tithe, whereas milch cows pay no tithe for agiſtment. And it is likewiſe to pay one halfpenny for every calf for the tithe due for the agiſtment of every calf, whereas calves pay no tithe for agiſtment for the firſt year; becauſe that every tenth calf is paid for tithe.

The counſel for the plaintiff in prohibition, argued, that as to the firſt exception, in *Yelv. Rep.* 86. was a caſe expreſly in point, and that the words of the *Modus* there particularly ſet out, are almoſt the ſame with the *Modus* in the preſent caſe; and that ſo, likewiſe, were the following caſes, *viz.* *Cro. Jac.* 42. *Hob.* 250. 1 *Rol. Abr.* 648. That the caſe of *Green* and *Auſtin*, *Yelv.* 86. is likewiſe reported in *Cro. Jac.* 116. and there it appears the preſcription is exactly the ſame as in the preſent caſe. And in *Lutw.* 1071. the preſcription was *Meſſuram graminis in cumulos congerere*; which are almoſt the ſame words uſed in *Yelverton*, and the preſcription was held well. And to the ſecond objection they cited *Cro. Eliz.* 475, 446. 1 *Rol. Abr.* 651. *Salk.* 662. *Carth.* 6.

Lord *Hardwicke*, Chief Juſtice: I think there is no difficulty in anſwering theſe objections; for the caſes cited are expreſly in point, and they are all the ſame in effect; only *Hobart* ſets forth more particularly the ſteps taken before the graſs was put into cocks. *Hobart* ſays, they uſed to put it into graſs cocks; and *Yelvert.* and *Lutw.* that they did *Gramen meſſum*, and *Meſſuram graminis in cumu-*

los

los congerere: ſo that whether called cocks, or graſs cocks, it ſeems to be the ſame; for theſe words do not imply that the graſs was made into hay cocks. So that theſe two books only expreſs more generally the ſame cuſtom, which is ſet forth in *Hob.* more particularly. And this can be no prejudice to the parſon; for he is to take his tenth cock, when all the graſs is made into cocks, ſo that he cannot be cheated; and the words which come after, *viz.* the ſaid cocks of hay, *&c.* in ſome manner explain what cocks are meant by graſs cocks. But if that is out of this caſe, yet, as this is a libel for the tithes for agiſtment of cattle in lands mowed the ſame year, be the *Modus* good or bad, the prohibition ought to ſtand; for no tithe is due for ſuch agiſtment. And as to the other objection, I think there is nothing in it; for it is ſaid to be paid in lieu and diſcharge of the tithes of cattle fed on that land; ſo it is in lieu of tithes for the cattle which ought to pay tithes, which are calves after the firſt year; and cows which are not milked, *&c.* Therefore I think the plaintiff muſt have his judgment; and the other judges being of the ſame opinion, judgment was given for the plaintiff.

N. B. It ſeems to be an eſtabliſhed rule, that the pariſhioner is obliged to make his graſs into graſs cocks; and the words of the *Modus* laid in *Yelv.* 86. and *Lutw.* 1071. ſeem barely to import no more than that; and ſo it ſeems likewiſe as to the preſent caſe. And as ſuch *Modus* would be certainly bad; and theſe caſes have been held to be a good diſcharge of the aftermath, as well as the caſe in *Hob.* 250. where it appears plainly, the pariſhioner did more than barely make it into cocks; it ſeems to me, that the courts, in the determination of this preſent caſe, as well as of the caſes in *Vaugh.* and *Lutw.* have laid ſome ſtreſs upon its being ſet forth that the graſs was made into cocks, at the proper coſts and charges of the pa-

riſhioners; which words ſeem to import that they have done more than the law obliges them to: for it is held in *Hob.* 250. that the tithe is naturally but the tenth of the revenue of the ground, not of my labour and induſtry, where it may be divided, as in graſs it may. But I could not obſerve the court took any notice of this obſervation, therefore queſtion what they ground their opinion on. *MS. Caſes in B. R. Eaſt.* 8 *Geo.* 2. *Maſon.* v. *Napleton.*

A man may allege a cuſtomary payment of a certain ſum yearly in diſcharge of tithes of ſuch particular lands, though a general cuſtom cannot be laid in a vill, and applied to any particular eſtate.

Action in prohibition to a ſuit in the ſpiriual court for tithes. The declaration ſets forth, that whereas *John Sharp* was and is poſſeſſed of a tenement, with the appurtenances, lying and being in the pariſh of *B*—— in the county of *Cumberland*; and whereas alſo within the ſaid pariſh there now is, and from time immemorial there hath been, ſuch a cuſtom, that, time out of mind, all the tenants and occupiers of the tenement aforeſaid, have paid for all the time aforeſaid, and have been uſed and accuſtomed to pay to the rector yearly 5*s.* and performed certain boons (mentioning them) in diſcharge of all tithes of corn, hay, *&c.* which the rectors for the time being have accepted of the tenants and occupiers, in full ſatisfaction and diſcharge of all tithes of corn and hay; and then avers, that they have inviolably obſerved the aforeſaid cuſtom and manner of tithing. The defendant by his plea traverſes the cuſtom, upon which iſſue is joined, and a verdict found for the plaintiff.

Mr. *Fenwick* moved for the defendant, in arreſt of judgment; and took an exception to the declaration, *viz.* That the *Modus* is ſet forth as a cuſtom, and yet that it is confined to a particular tenement; whereas in 1 *Lutw.* 126. *Cro. Car.* 418. 1 *Ventr.* 97. it is held, that a cuſtom cannot be laid in a vill, and applied to a particular place or inhabitant therein, unleſs in the caſe of a copyholder.

Mr.

Mr. *Denison* argued to the same purpose, and cited 2 *Lutw.* 1319. *Brook Abr.* tit. *Custom* 51. *Poph.* 201.

Mr. *Bootle contra*, said, That the cases cited referred to charges affecting other persons estates; and therefore they are not applicable to this case, which lays a custom to exonerate his own estate, between which two cases this difference has been taken and allowed, that in the last case, it is sufficient to allege such a usage and custom in the tenants and occupiers, and the reason is, because the charge cannot be laid, but by way of grant in the first case, and therefore the charge must be derived down by way of a *que estate*, from the original grantor; whereas in the latter case, which only tends to discharge the land of the owner from the payment of tithes, it is sufficient to shew that the tenants and occupiers, who are chargeable with the payment of tithes, have always paid such consideration, in lieu and satisfaction of them. 4 *Co. Foiston*'s case. *Poph.* 201. *Cro. Car.* 419. *b. Co. Gateward*'s case. *Hut.* 118. *Dy.* 349. 1 *Vent.* 3. 3 *Lev.* 386. And he said, that there was a difference between this action in prohibition and others; for that though it might appear that the *Modus* was not formally set forth, yet if it appeared to the court that this *Modus*, or custom was good in substance, that no consultation ought to go. *Yelv.* 55. *Hob.* 85, 300.

Lord *Hardwicke* Ch. J. The question in this case is, Whether the *Modus* be substantially and effectually founded. 'Tis objected that though the subject matter of the *Modus*, as alleged, is private property, yet that it is defective in the manner of setting it forth, it being confined to the tenants and occupiers of a particular tenement. For it is said, that as a custom is in its nature local, it ought to be extended to the whole parish or vill, and not be confined to any particular tenement, as this is; and it is certain that there are many cases to that pur-

poſe, but they are not applicable to this caſe; for the difference that has been taken between the manner of ſetting forth a cuſtom, to charge the lands of another perſon, and to diſcharge one's own, is well founded, and very material to the preſent caſe: for it is admitted that there are caſes, where, for the neceſſity of the thing, a cuſtom may be laid in a particular eſtate, as in the caſe of the copyholder. 4 *Co. Foyſton's* caſe; and the reaſon of that reſolution is, that a copyholder of a manor cannot preſcribe in a *que eſtate* againſt his lord; for none can do it, but he who has a fee-ſimple: Whereas in conſtruction of law, a copyholder is only a tenant at will, the inheritance being in the lord. Now the reaſon of that caſe is applicable to this; for how could this plaintiff have laid his preſcription otherwiſe? For he could not ſay, that he and all thoſe, whoſe eſtate he has, have been time out of mind diſcharged from the payment, *&c.* for it is not a diſcharge but a ſatisfaction, which he relies on. It is allowed that this would be good, if it had been ſaid, that time out of mind there had been ſuch a *Modus* in lieu and ſatisfaction of tithes; which ſhews, that it is not neceſſary to lay this exemption by way of preſcription in a *que eſtate*, nor indeed can it be ſo. And all the caſes cited go on this rule, that it was not well laid by way of cuſtom, becauſe it ought to have been laid by way of preſcription in a *que eſtate*. If it had been laid here, that within this pariſh, time out of mind, the tenants and occupiers had paid; or if it had ſaid, the tenants and occupiers had been uſed and accuſtomed to pay, that would have been well laid; and what difference is there between the word *uſed* and *accuſtomed*, and to ſay, *there is ſuch a cuſtom*. By which it appears the word *cuſtom* means no more than that there is ſuch a *Modus*, which word is allowed to be good. Beſides, this being a caſe in prohibition differs it much from other

other cafes. For in this caſe the defendant is in the nature of a plaintiff or actor, who prays judgment for his coſts, and likewiſe for a conſultation; and therefore if any thing is found in ſubſtance againſt him, there ſhall be no conſultation. And the reaſon is becauſe the plaintiff in the original ſuit has not proved his caſe. Wherefore, upon the whole, I think the judgment ought not to be arreſted.

Page J. of the ſame opinion.

Probyn J. This is like the caſe cited of the copyholder; for, he being only an occupant, cannot preſcribe in a *que eſtate*.

Lee: It appears by *Hob*. 85. That the uſe of the word *cuſtom* does not make the caſe fall within the rules applicable to cuſtoms; and if the manner of the laying the diſcharge be otherwiſe good, the word cuſtom can't hurt it. For the true conſtruction of this word here is, that it is uſual and cuſtomary for the tenants, *&c.* which is in the nature of a preſcription for a diſcharge; and therefore I think the declaration is good. Court gave judgment for the plaintiff. *MS. caſes in B. R. Trin.* 10 *Geo.* 2. *Sharp* v. *Lowther*.

A rule had been obtained in *Michaelmas* term 1755, to ſhew cauſe why an order of two juſtices, made upon three quakers for payment of tithes under the value of ten pounds to the curate of a chapel in *Weſtmorland*, and confirmed at the ſeſſions, ſhould not be quaſhed; together with the order of ſeſſions confirming it.

It ſhould appear that the title to tithes is really in queſtion before a *Certiorari* iſſues, to remove an order of two juſtices made on *ſtat.* 1 *Geo.* 1. *ſt.* 2. *c.* 6. *ſect.* 2. See *pag.* 179.

To this order four exceptions were taken. 1, It is a joint order made on different perſons for diſtinct non-payments of different tithes: Whereas there ought to have been a diſtinct order on each. And in *Strange* 471. between the pariſhes of *Chewton* and *Compton-Martin*, the removal of two different families of paupers by one order, was holden bad; though the pariſhes were the ſame. 2. The title is in queſtion: Therefore

the juſtices have no juriſdiction. The exception in the act of 1 *Geo.* 1. *ſt.* 2. *c.* 6. *ſect.* 2. is, "unleſs the titles of ſuch tithes, dues or payments ſhall be in queſtion." And theſe words "unleſs, *&c.*" extend to this whole cauſe; and are not confined to the granting a *certiorari* only. And the fact of the title being in queſtion appeared upon the granting the *certiorari*. 3. *Non conſtat*, that the two juſtices who made this original order, are *neither patrons nor intereſted in the tithes.* But 1 *Geo.* 1. *cap.* 6. *ſect.* 2. requires that they ſhall be neither one nor other. Now they ought expreſly to aver and ſhew (negatively) that they are not: or elſe they have no juriſdiction by the very words of the act; the juriſdiction being given to *any two or more juſtices, &c. other than ſuch as, &c.* 4. It does not ſufficiently aſcertain and ſtate what is due and payable by the defendants; or at leaſt, for what the reſpective ſums are due. One ſum is 1 *s.* 6 *d.* being due to the curate; not ſaying for what; Another is, 2 *s.* "being the value of their ancient cuſtomary payments." Another is 4 *s.* ancient cuſtomary payments."

This order was made on the act of 1 *Geo.* 1. *ſt.* 2. *c.* 6. *ſect.* 2. which extends the 7 *&* 8 *W.* 3. *c.* 34. *ſect.* 4. (ſee *page* 177, 178.) to all payments to miniſters or curates officiating in churches or chapels.

The court inquired, Whether the return of the *certiorari* was filed. And lord *Mansfield* ſaid, he had called for, and read the affidavits made for obtaining the *certiorari*; and upon the ſhewing the cauſe.

Mr. Juſtice *Deniſon* cited a caſe of *Rex* v. *Furnes*, *B. R. H.* 6 *Geo.* 1. upon a *certiorari* to remove an order made upon the act 7 *&* 8 *W.* 3. *cap.* 6. for payment of ſmall tithes: Where lord Chief Juſtice *Pratt* thought that where the right was in queſtion, ſuch

ſuch caſes were never intended to be the ſubject of that act of parliament. He ſaid, this was only ſpoken from a note, which he had ſeen: But it ſhould ſeem to be right and juſt, and the rather, from a caſe of *Rex* v. *Furneſs*, being mentioned in 4 *Strange* 264. where an order for non-payment of ſmall tithes made on 7 & 8 *W.* 3. *cap.* 6. was quaſhed.

In *Hilary* term 31 *Geo.* 2. lord *Mansfield* delivered the opinion of the court. He firſt ſtated the two acts of 7 & 8 *W.* 3. *c.* 34. (*ſect.* 4.) and 1 *Geo.* 1. *c.* 6. (*ſect.* 2.) The former relates only to great and ſmall tithes and church rates, and is temporary. The latter makes it perpetual, and extends it to *any tithes or rates, or any cuſtomary or other rights, dues or payments belonging to any church or chapel, which, of right, by law and cuſtom ought to be paid, for the ſtipend or maintenance if any miniſter or curate officiating in any church or chapel.* And both acts direct, *That the proceedings ſhall not be removed into any other court, unleſs the title ſhall be in queſtion.* It is upon the laſt act, the preſent order was made. A *certiorari* has iſſued, to remove the order into this court; and it came on, upon exceptions to the order. Both ſides made very material obſervations. One ſide, to the order; for that the juſtices had no juriſdiction, becauſe the title was in queſtion: The other, to the *certiorari*; for that no *certiorari* could iſſue, by the expreſs proviſion of the act, to remove the proceedings from before the juſtices into any other court, becauſe the title was not in queſtion.

This act was made in favour to, and for the eaſe and benefit of quakers, and to ſave them from troubleſome and expenſive proſecutions: But never meant, that a mere ſcruple of theirs, or an obſtinate withholding of the tithes, ſhould be any hinderance to the matter being determined by the

juſtices of peace. This would have fruſtrated the very intention of the act: which meant to give this juriſdiction to the juſtices in that very caſe; where the right and title to them ſhould not be in diſpute between the parties.

It is ſworn on the part of the defendants, that the defendants controverted the title to the tithes before the juſtices; and alſo, that the title to the tithes was then, and at the time of making the ſaid affidavit, really in queſtion.

The juſtices had notice to ſhew cauſe againſt the *certiorari*. On ſhewing ſuch cauſe, five old inhabitants of the chapelry ſwear by their affidavit, that ſuch cuſtomary ſtipends or payments have always been paid to the curate by the landholders, without any ſort of ſcruple or objection, except lately by the quakers: And no other perſon diſputes it. And theſe five perſons all ſwear that they believe them to be due; and that the former owners of theſe lands (which had been purchaſed about four years ago, by theſe quakers), did pay for them, as other perſons did, in the ſaid chapelry, and theſe quakers purchaſed the lands as ſubject to ſuch payments. Theſe are the affidavits upon which the *certiorari* was granted. Now if this general allegation of the quakers controverting the title, and the conſequential aſſertion, that the title was in queſtion without any particulars, or ſhewing at all upon what foundation they controverted the payment, ſhould be eſteemed a ſufficient ground for removing the orders, it would put a total end to theſe acts of parliament, and evade the very deſign and intention of making them. For the quakers might pretend that they are obliged in conſcience to refuſe or controvert the payment of theſe demands; and conſequently, to queſtion and deny the right to receive them. Now that is the very thing the act meant to provide a

ſum-

ſummary remedy for. The intention was, that in ſuch caſe, the juſtices ſhould make an order to compel them to pay. Their affidavits are general, that they controverted the title; and that it was really in queſtion. Whereas by the affidavits made by the 5 old inhabitants, it is very plain that the former owners of theſe very lands have always paid; and that theſe quakers, who are the ſubject of this order, have no pretence to diſpute it, upon any other foot, than their own general ſcruple to pay any demands of this nature; which theſe acts are, for their own eaſe and advantage, calculated to compel them to do, in a method the moſt gentle and convenient for themſelves, who ſcruple to pay without compulſion. For theſe reaſons, we are all of opinion, as to the merits of the caſe, that the title is not ſo controverted, or ſo in queſtion, as that the juſtices can be precluded from juriſdiction, or their order be regularly and properly removed into any other court. And we are all of opinion that the rule for the *certiorari* having been made abſolute, and the return thereto having been filed, oūght not now to ſtand in the way and prevent our coming at the real juſtice and merits of the caſe. For if the *certiorari* iſſued *improvidè*, we can order it to be ſuperſeded; and the return to be taken off the file. And there have been ſeveral inſtances of this proceeding; one was where an order of two juſtices was appealed from; and before the time when the appeal ſhould in courſe have come on at the ſeſſions, a *certiorari* was brought before the time of hearing the appeal was come; the *certiorari* was quaſhed, and the return taken off the file. The other was a *certiorari* to remove an indictment from the *Old Baily*: And it appearing to this court, that they could not give judgment, but that the ſeſſions of *Oyer* and *Terminer* at the *Old Baily* ought to do it; the like method was taken, and it was ſent back

back to the court below, for them to pronounce the judgment. Therefore upon this caſe, we are all of opinion, that the writ of *certiorari* be ſuperſeded, *quia improvide emanavit*; the return taken off the file, and the order remanded.

His lordſhip added this hint, to be obſerved in future caſes of this ſort, *viz.* That upon all orders of this kind, the great and material point muſt be, *Whether the title to the tithes was really in queſtion, or not*, and ought to be determined before the *certiorari* iſſues. *M S. caſes in B. R. Hil.* 31 *Geo.* 2. *Rex* v. *Wakefield & al*.

INDEX.

A.

Appropriation, what, *Page* 2
Ancient Demeſne, 17
Abbey Land, and Catalogue of the the Monaſteries diſſolved by Stat. 31 *Hen.* 8. 23, 33
Acorns, 53
After-eatage, 54
Aftermath, or Aftermowth, 54
After paſture, 55
Agiſtment, or Paſturage, 55, 59
Alders, 59
Altarage, 59
Apples, 60
Aſh, 60
Aſh Trees, 60

B.

Barren Land, 17, 18, 19, 20, 21, 22
Bark, 60
Beans and Peaſe, 60, 66
Beech, 67
Bees, 67
Birch, 67
Brick, 67
Broom, 68

C.

Calves, 68
Cattle, 69, 198, 199
Chalk, 70
Cheeſe, 70
Cherries and Cherry Trees, 71
Chickens, 71
Clay, 71
Clover,

Clover, —— —— Page 71, 73
Coal, —— —— 73
Colts, —— —— 74
Common, —— —— 14, 21
Compoſition real, what, —— —— 41
Conies, —— —— —— 74
Copper Mill. See Mill.
Coſts. Bill for Thirteen Sorts of tithes, the plaintiff proves but One ſpecies due, and doth not abridge by his replication, yet the Court decreed him Coſts generally, 193
Curate perpetual removeable at pleaſure, and he cannot ſue for tithes, —— 192
Cuſtom, difference between it and preſcription, 36

D.

Deer, —— —— 76
Dotards, —— —— 76
Doves, —— —— —— 76
Diſcharge. See Exemption.

E.

Eggs, —— —— 76, 77, 214
Elm, —— —— —— 77
Evidence. Objection that a witneſs has the Inheritance of lands in the parish (in the hands of a Tenant) goes only to his Credit, 187
Value of tithes to be aſcertained by the plaintiff's Oath, in what Caſes, —— 188
A Lay Impropriator only proved that tithes belonged to perſons under whom he claimed, and ſufficient, —— 194
Exception, allowed for not ſetting forth Quantities and Values of tithes particularly, 190
Exchequer, Suits therein concerning tithes, 187
Exemption, Means of being exempted from payment of tithes, —— 33, 36
—— from tithes, how to be laid, 188
—— of lands from tithes, as belonging to one of the greater monaſteries, how to be laid in a bill, —— —— 189

Exemption; where a general Exemption is inſiſted on, a partial one cannot be admitted in proof, *Page* 194
Tithes of one thing cannot be a Diſcharge of tithes of another, 201
Extraparochial places, tithes in, 13

F.

Foreſt land, 16
Fenny land, 20
Faggots, 77
Fallow, 78
Fenns, 78
Fern. See Heath.
Fiſh, 5, 78, 82
Flax 82
Foreſt, 82
Fowls, 83
Fruit, 83
Fuel 83
Furzes, 84

G.

Glebe, what, and when to pay tithes, 22, 23
Gardens, 84
Geeſe, 85
Glaſs-houſe, 85
Graſs 85
Gravel, 86

H.

Heath-ground, what, 19
Haſle, 86
Hay, 86, 89, 201
Head-land, 89
Hedge-poles, 90
Hemp, 90
Herbage. See Agiſtment, Furze.
Holly 91
Honey, 91
Hops, 91, 97
Horſes,

Horſes, — — — Page 97
Houſes, — — — 98

I.

Impropriation, what, — 2
Impropriator, whether a Lay Impropriator muſt ſet forth his Title, — — 191
Injunction, to the Spiritual Court to ſtay a libel for tithes, where a *Modus* is ſought to be eſtabliſhed, 191
Inn-keeper, Suit in the Spiritual Court againſt him for tithes of the profits of his Kitchen, Stables, and Wine-cellar, prohibited, 6

L.

Lambs, — — — 98, 100, 205
Lattermath. See Aftermath.
Lead, — — 100
Leaſes of tithes for lives or years by Eccleſiaſtical perſons, — 212, 238
Lime, — — 100
Limitation, the Statute of, Not pleadable to a bill for tithes, — 192
Line. See Flax.
London, Manner of paying tithes, and the Sums payable by the reſpective pariſhes there, 238
Loppings, — — 101
Limitations, the Statute of, not pleadable to a bill for tithes, — — 102

M.

Madder, — — 101, 102
Maple, — — 102
Maſt, — — 102
Milk, 102, 105, 198, 202, 203
Mill, — 6, 10, 106, 109
Mines, — — — 109
Modus Decimandi, what, — 40
—— muſt have a reaſonable Commencement, 40
—— muſt be for the parſon's benefit, 42

Modus must not be one tithe in lieu of another, *Page* 43
—— must be different in kind from the thing that is due, 44
—— must be certain, 45, 48
—— must be ancient, 48
—— must be durable, 49
—— must be without Interruption, 49
—— how Deſtroyed, 49
—— how to be tried, 50, 51
—— Coſts of trying it, 52
—— although a *Modus* be pleaded, yet Quantities and Values muſt be ſet forth, 194
—— where *Modus* void in the whole, 202
Monaſteries. See Abbey land.

N.

Nurſeries, 109

O

Oak, 110
Offerings, 110
Orchards, 110
Oſiers, 110

P.

Park, 16, 110, 111
Parſon, who, 1
Parſon Imparſonee, who, 2
Parſonage, what, 2
Party. Bill for tithes by the Biſhop and Sequeſtrator, during the Incapacity of the Incumbent, diſmiſſed, for want of making the Incumbent a party 195
Partridge, 111
Paſture. See Agiſtment.
Peaſe, 111
Pheaſants, 111
Pigeons, 112
Pigs, 112

Plea. Plea of a decree in Chancery to establish *Modus's* to a bill for tithes, allowed, *Page* 196
Portion of tithes, what, — 12
——— are distinct from tithes annexed to a rectory, — — 12
Prescription, — 37, 40, 200
Prohibition. Prohibitions in Suits for tithes, 196
——— what is a prohibition, and when to be granted, — — 196
——— grantable *ex debito Justiciæ*, 197
——— for citing out of the Diocese, 207
——— a Vicar libels for tithes, upon denial of it to be a Vicarage, a prohibition granted, 211
——— no prohibition if the Suggestion be false, *ibid.*

Q.

Quarries, — — 16, 112
Quakers. Tithes to be recovered before Justices of the peace, — 177, 181

R.

Rakings, — — 113
Roots, — — 113
Rent, — — 206

S.

Saffron, — — 113
Salt, — — 113
Sheep, — 114, 115
Ship. See Fifh.
Slate, — — 115
Statutes, *viz.* 13 *Ed.* 1. *ſt.* 4. — 149
——— 9 *Ed.* 2. 2. *ſt.* 1. *c.* 1. — 151
——— 18 *Ed.* 3. *ſt.* 3. *c.* 7. — — 151
——— 1 *Rich.* 2. *c.* 13. — 152
——— 27 *Hen.* 8. *c.* 20. 153, 154, 155
——— 31 *Hen.* 8. *c.* 13. — 24
——— 32 *Hen.* 8. *c.* 7. 157, 158, 159, 160
——— 2 *Ed.* 6. *c.* 13. 13, 14, 17, 18, 143, 161
——— 1 *Eliz.* *c.* 29. — 215

Statutes 13 *Eliz.* c. 10. — *Page* 216
— 18 *Eliz.* c. 6. — 221
— 7 & 8 *Will.* 3. c. 6. — 173, 174, 175, 176
— 7 & 8 *Will.* c. 34. — 177, 178
— 9 *Ann.* c. 22. — 258
— 10 *Ann.* c. 11. — 259
— 12 *Ann.* ſt. 2. c. 17. — 263
— 1 *Geo.* 1. c. 23. — 263
— 4 *Geo.* 1. c. 14. — 264
— 5 *Geo.* 1. c. 9. — 264
— 12 *Geo.* 1. c. 39. — 265
— 13 *Geo.* 1. c. 35. — 268
— 1 *Geo.* 2. ſt. 2. c. 15. — 271
— 2 *Geo.* 2. c. 30. — 274
— 3 *Geo.* 2. c. 3. — 275
— 3 *Geo.* 2. ſt. 1. c. 17. — 276
— 3 *Geo.* 2. c. 19. — 276
— 3 *Geo.* 2. c. 33. — 278
— 4 *Geo.* 2. c. 20. — 281
— 5 *Geo.* 2. c. 4. — 281
— 6 *Geo.* 2. c. 8. — 281
— 6 *Geo.* 2. c. 11. — 281
— 6 *Geo.* 2. c. 21. — 285
— 6 *Geo.* 2. c. 25. — 286
— 11 *Geo.* 2. c. 19. — 182, 183, 184, 185
— 31 *Geo.* 2. c. 12. — 101, 102
Stubble, — — 115
Suggeſtion. See Prohibition.
Sylva Cædua. See Trees, Wood.

T.

Taxes, — — 116
Tender of tithes, at what time ſaves the Defendant's Coſts, — 189
Tile, — — 117
Tithes, Definition of, — 1
— Origin of, — 3, 4
— ſeveral Kinds of, — 4, 5
— Great and Small, — 10

Tithes, out of what things to be paid; what Lands are subject to, and what Lands are discharged from, tithes, — *Page* 15
— Setting out, Taking, and Carrying away, 140
— Remedies for recovering tithes, and the several acts of parliament made for that purpose, 148
Trial, whether Lands are Barren, or not, must be in the Temporal, and Not in the Spiritual court, 22
Trees, 117, 127
Turf, 127
Turkeys, 128
Turnips, 128

U.

Uberiores decimæ, what, 199

V.

Vicar, who, 2
Vicar endowed, who, 2
Vicarage, what, 2
Vicar need not set forth how he is intitled to tithe Herbage and Small Tithes, 187
— in what case need not shew any Special Title, by Endowment or Prescription, 189
— Bill by him for tithe herbage and furze, 190

W.

Waste, 14, 19, 128
Willows, 129
Woad, 129
Wood, 129, 134, 198, 200
Wool, 134, 139

Y.

Yearlings, 139

FINIS.

Thorpe & Blandlow's Case — p. 57

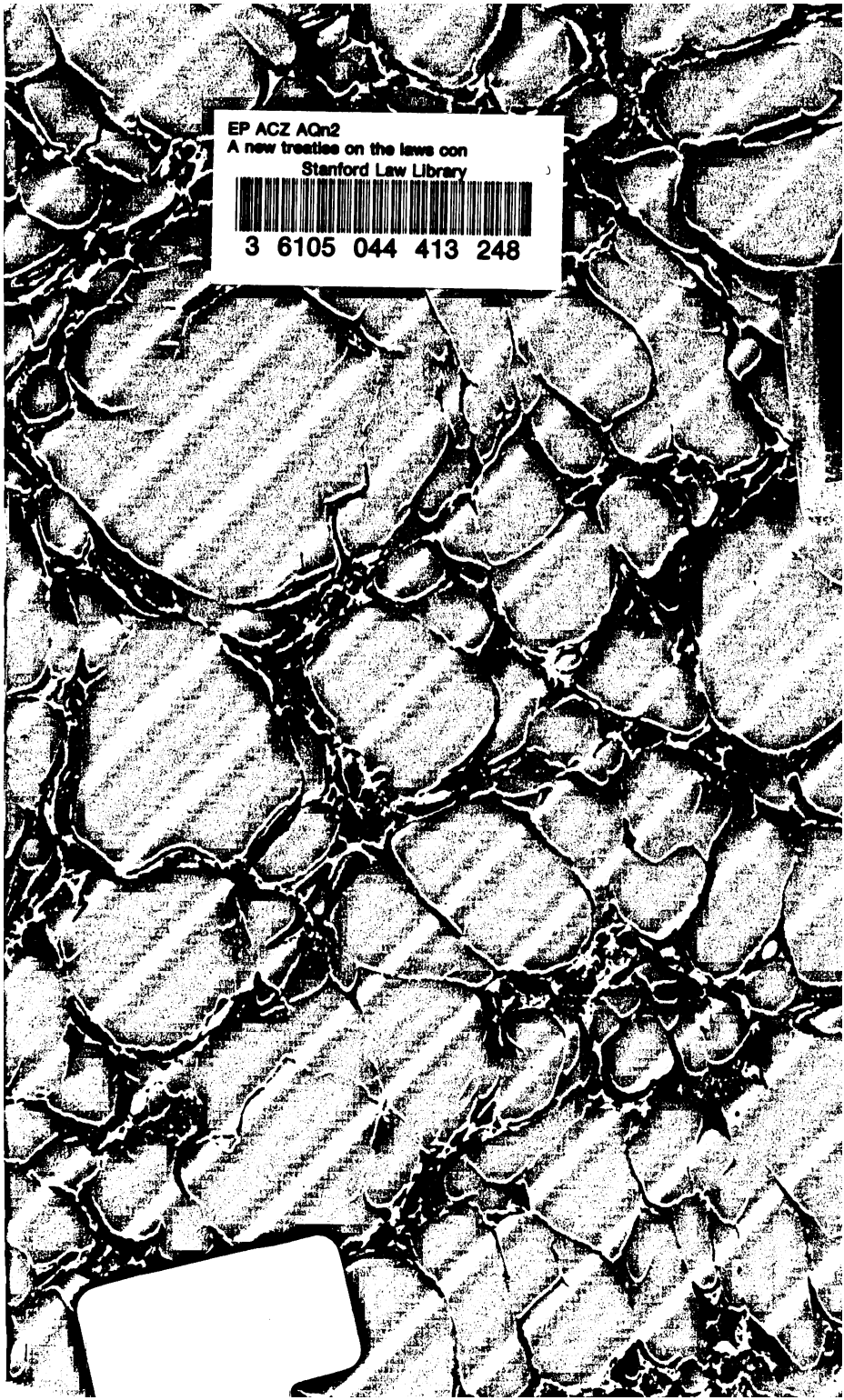
N.B. The Defendant printed & dispersed a State of his Case with his own Remarks upon it & sent a Copy to all the Members of the H. of Commons in hopes of prevailing on them to take the Case into Parliamentary Consideration as an infringement of their Liberties &c.

Among other complaints he said, He supposed the Clergy in soon claim Tithes to be paid by the Gentry for their Wives & Daughters as compositable Cattle.

The Case as stated by Blandlow himself, with the Opinion of the Barons of the Exchequer is much more in favour of the Clergy than what is here reported.

This Case is since printed in Burns Eccl. Law, but not so fully as it ought




EP ACZ AQn2
A new treatise on the laws con
Stanford Law Library
3 6105 044 413 248